

Can (Did) Congress Overrule Miranda

Yale Kamisar

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CAN (DID) CONGRESS “OVERRULE” *MIRANDA*?†

Yale Kamisar††

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*[If the people don't like [certain judicial interpretations of a statute], Congress can change them if only it gets around to doing so. But if the people don't like Miranda, Congress can do nothing except promote an amendment to the Constitution. —Henry Friendly (1967)]*¹

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¹ HENRY J. FRIENDLY, *A Postscript on Miranda*, in BENCHMARKS 266, 269 (1967). Judge Friendly recognized that in *Miranda v. Arizona*, 384 U.S. 436, 490 (1966), Chief Justice Warren had observed that “Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective” as those provided by the now-familiar *Miranda* warnings. But this struck Judge Friendly as “mostly for the record. After the Court has formulated its own detailed requirements and made them so exceedingly high, it is hard to imagine what interest state legislators would find in seeking to devise different ones that would only dubiously pass muster.” FRIENDLY, *supra*, at 269 n.11. I disagree with Judge Friendly on this point. See *infra* text accompanying notes 137-46.

INTRODUCTION

I think the great majority of judges, lawyers, and law professors would have concurred in Judge Friendly's remarks when he made them thirty-three years ago. To put it another way, I believe few would have had much confidence in the constitutionality of an anti-Miranda provision, usually known as § 3501 because of its designation under Title 18 of the United States Code, a provision of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter referred to as the Crime Act or the Crime Bill), when that legislation was signed by the president on June 19, 1968.² Section 3501 makes the pre-Escobedo,³ pre-Miranda⁴ "due process"—"totality of circum-

² See Statement by President Lyndon B. Johnson upon Signing the Omnibus Crime Control and Safe Streets Act of 1968, 1 PUB. PAPERS 725, 725 (June 19, 1968) [hereinafter Statement by the President]; Max Frankel, *President Signs Broad Crime Bill with Objections*, N.Y. TIMES, June 20, 1968, at A1. The relevant portions of § 3501 read as follows:

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

...
(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

18 U.S.C. § 3501 (1994).

³ *Escobedo v. Illinois*, 378 U.S. 478 (1964), extended the right to counsel to the pre-indictment stage, but it was unclear whether the right came into play "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession," 378 U.S. at 492, or when the process so shifted and one or more of the limiting facts in *Escobedo* were also present. For a summary of the wide disagreement over the meaning of *Miranda*—and over what it ought to mean, see YALE KAMISAR, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY, 161-62 (1980) [hereinafter POLICE INTERROGATION].

stances"—"voluntariness" rule the sole test for the admissibility of confessions in federal prosecutions, thereby purporting to overrule by legislation the Warren Court's two most famous confession cases. (Although rarely, if ever, noted, § 3501 also literally overrules at least two other Supreme Court cases.⁵)

However, even if it were true that the Supreme Court would not have permitted Congress to do anything about (or would only have allowed it to do very little about) *Miranda* some thirty years ago, whether the Court will take the same position today is a very different question. For in the 1970s and 80s the Court had some unkind things to say about *Miranda*.⁶ The Burger and Rehnquist Courts' characterization of and comments about *Miranda* give reason to believe that the

In *Beckwith v. United States*, 425 U.S. 341 (1976), *Escobedo's* "focus" test, as it had generally been understood at the time the case was handed down, was expressly rejected as a basis for advising a suspect of his constitutional rights. Furthermore, in *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972), the principal opinion by Justice Stewart looks back on *Escobedo* as the "only seeming deviation" from a long line of cases holding that one's right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him." Moreover, added Stewart, "in retrospect" the Court has considered *Escobedo* a case effectuating the self-incrimination clause, not the right to counsel. See *id.* at 689. Thus, it has been clear for some time that *Miranda* did not build on the approach taken in *Escobedo* as much as it displaced it—*Miranda's* use of "custodial interrogation" actually marked a fresh start in describing the point at which constitutional protections begin. But this was not at all clear to most people at the time Title II of the Crime Bill was drafted and debated.

⁴ *Miranda* held for the first time that the privilege against self-incrimination applies to the informal proceedings in the interrogation room (or other custodial situations) as well to more formal proceedings, such as those in a courtroom or before a congressional committee. To break it down, *Miranda* held that the privilege may apply to situations where there is informal pressure to speak, that informal compulsion is inherent in any custodial questioning and that, in the absence of some equally effective alternative safeguard, certain specified warnings are required to dispel the compelling pressures inherent in custodial interrogation. Thus, as Professor Schulhofer has emphasized, although the *Miranda* warnings requirement is the most famous aspect of the case and is often called its holding, actually it is only the last step in a series of holdings. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987).

⁵ Although, so far as I can tell, no participant in the congressional debate over the Crime Bill seemed to be aware of this, in addition to purporting to overrule *Miranda* and *Escobedo*, § 3501 literally overruled *Massiah v. United States*, 377 U.S. 201 (1964) and *Wong Sun v. United States*, 371 U.S. 471 (1963). According to the *Massiah* doctrine, once adversary proceedings have commenced against an individual (i.e., he has been indicted or arraigned), government efforts to "deliberately elicit" incriminating statements from him violates the individual's right to counsel and bars the use of any resulting statement regardless of whether it was voluntarily made. See *Massiah*, 377 U.S. at 205-07; see also *Brewer v. Williams*, 430 U.S. 387 (1977) ("Christian Burial Speech" case); *United States v. Henry*, 477 U.S. 264 (1980). *Wong Sun* holds that even voluntary statements may be inadmissible if derived immediately from an illegal arrest or search or otherwise the "fruit" of a Fourth Amendment violation. See *Wong Sun*, 371 U.S. at 484-87. *Brown v. Illinois*, 422 U.S. 590 (1975), subsequently held that *Miranda* warnings, by themselves, do not necessarily purge the taint of the prior illegal arrest or search. See *id.* at 604.

⁶ See *Michigan v. Tucker*, 417 U.S. 433 (1974); *New York v. Quarles*, 467 U.S. 649 (1984); *Oregon v. Elstad*, 470 U.S. 298 (1985); *infra* text accompanying notes 278-311; *infra* note 298. On the other hand, the Court had some very nice things to say about *Miranda* in

Court's thinking about that famous case has changed dramatically since the days of the Warren Court.

To give but one example of how the case for upholding the constitutionality of § 3501 has changed: So far as I can tell, no witness who testified at the committee hearings on the Crime Bill and no participant in the House and Senate debates over the bill ever referred to the *Miranda* warnings or *Miranda* procedural safeguards as "prophylactic." This fact is hardly surprising for the *Miranda* opinion itself never did so either.⁷ But when a panel of the Fourth Circuit in *United States v. Dickerson*⁸ sustained the constitutionality of § 3501, thereby holding that the pre-*Miranda* "voluntariness" test set forth in this section, rather than the *Miranda* case, now governs the admissibility of confessions in the federal courts, it relied heavily on the fact that the Burger and Rehnquist Courts had "consistently (and repeatedly) . . . referred to the [*Miranda*] warnings as 'prophylactic' . . . and 'not themselves rights protected by the Constitution.'"⁹

Withrow v. Williams, 507 U.S. 680 (1993); see also *Minnick v. Mississippi*, 498 U.S. 146 (1990). See discussion *infra* text accompanying notes 361-69, 379-86.

⁷ So far as I can tell, the first time the Supreme Court explicitly called the *Miranda* rules "prophylactic" was in *Michigan v. Payne*, 412 U.S. 47, 53 (1973). *Payne* declined to give retroactive effect to "the 'prophylactic' limitations" that *North Carolina v. Pearce*, 395 U.S. 711 (1969), had established "to guard against the possibility of vindictiveness" in imposing a more severe sentence upon a defendant who has been retried and reconvicted. *Payne*, 412 U.S. at 51. The *Payne* Court observed that

Pearce is analogous to *Miranda v. Arizona*, in which the Court established rules . . . in order to safeguard the rights of the accused and to assure the reliability of statements made during those interrogations. Thus the prophylactic rules in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process.

Id.

The closest the *Miranda* opinion came to using the term *prophylactic rule* was a reference to the *McNabb* and *Mallory* cases as occasions where "[the Court] recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself." *Miranda*, 384 U.S. at 463. *Mallory v. United States*, 354 U.S. 449 (1957), reaffirmed *McNabb v. United States*, 318 U.S. 332 (1943). The *McNabb-Mallory* rule operated to exclude from federal prosecutions all incriminating statements obtained during prolonged, and hence illegal, prearrest detention, regardless of whether the record showed that the statements were involuntarily made.

A subsection of the same statute that purports to overrule *Escobedo* and *Miranda* does badly cripple the *McNabb-Mallory* rule. See 18 U.S.C. § 3501(c). However, since the *McNabb-Mallory* rule—unlike *Miranda*—was fashioned "quite apart from the Constitution," *McNabb*, 318 U.S. at 341, and in the exercise of the Supreme Court's "supervisory authority over the administration of [federal] criminal justice," *id.*, it is subject to repeal by Congress. As I read the *Miranda* opinion, the Court compared and contrasted the ruling it was handing down that day with the *McNabb-Mallory* rule, noting that, because of the Federal Rules of Criminal Procedure and the effectuation of those rules in *McNabb* and *Mallory*, "we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations." *Miranda*, 384 U.S. at 463 (emphasis added). "These supervisory rules," added the Court, "were nonetheless responsive to the same considerations of *Fifth Amendment* policy that unavoidably face us now as to the States." *Id.* (emphasis added).

⁸ 166 F.3d 667 (4th Cir.), cert. granted, 120 S. Ct. 275 (1999).

⁹ *Id.* at 689.

In this Article, I shall consider the arguments made in defense of the constitutionality of § 3501 at the time it was debated and enacted some thirty years ago and the arguments made on behalf of § 3501 today. But first I think it useful to discuss the history of, and debates over, § 3501—and the mood of the U.S. Senate (and the country) at the time.

I

BACKGROUND

A. The Evolution of the Crime Bill

In February 1967, President Lyndon B. Johnson proposed legislation authorizing massive federal grants to state and local governments for improving law-enforcement facilities and training new and existing police personnel.¹⁰ The Crime Bill that came back to the White House sixteen months later, which the president reluctantly signed on June 19, 1968,¹¹ "was a much broader piece of legislation."¹²

Although the Crime Bill retained much of the Administration's original proposals, it also contained two major provisions about which the president had serious misgivings: Title III, which granted law enforcement officials extensive powers to conduct wiretapping and electronic surveillance,¹³ and Title II, which one commentator called "a grab-bag of anti-Court items."¹⁴ As finally enacted,¹⁵ the latter title had two sections. One, § 3502, purported to "overrule" recent

¹⁰ See ADAM CARLYLE BRECKENRIDGE, *CONGRESS AGAINST THE COURT* 1-3 (1970); RICHARD HARRIS, *THE FEAR OF CRIME* 15-20 (1969).

¹¹ President Johnson did not sign the bill until almost the last hour, finally concluding that it contained "more good than harm." See Frankel, *supra* note 2. See also HARRIS, *supra* note 10, at 109-10 (discussing President Johnson's delay in signing the Crime Bill). The president opposed Title III of the Crime Bill, which granted law enforcement officials extensive powers to conduct wiretapping and electronic surveillance. See Statement by the President, *supra* note 2, at 726-27. He also was unhappy with various sections of Title II, which purported to overturn a number of Supreme Court rulings, including *Miranda*. See *id.* at 727. In signing the bill, the President pointed out that he had asked the Attorney General and the director of the FBI to assure him that federal agents and attorneys would continue to give suspects "full and fair warning" of their constitutional rights. *Id.*; accord Frankel, *supra* note 2; BRECKENRIDGE, *supra* note 10, at 3-5.

¹² BRECKENRIDGE, *supra* note 10, at 3. See also Note, *Title II of the Omnibus Crime Control Act: A Study in Constitutional Conflict*, 57 GEO. L.J. 438, 439-40 (1968) (discussing political history of the Crime Bill).

¹³ See generally Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1 (1983); Herman Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969).

¹⁴ Fred P. Graham, *Congress Still Battling the Court*, N.Y. TIMES, May 26, 1968, at E15.

¹⁵ As reported out of committee, Title II would also have eliminated: (a) any federal review of the admission of confessions in state cases, (b) any Supreme Court review of federal court rulings on lineup identifications, and (c) federal habeas corpus jurisdiction over state prisoners. See Recent Statute, *Title II of the Omnibus Crime Control and Safe Streets Act of 1968*, 82 HARV. L. REV. 1392, 1392-93 (1969). These jurisdictional restrictions were

Supreme Court decisions extending the right to counsel to police lineup identification procedures.¹⁶ The other section, 3501—the focus of this article—purported to overturn the Warren Court's two most famous confession cases, *Escobedo*¹⁷ and *Miranda*,¹⁸ by providing that in all federal prosecutions any confessions "shall be admissible in evidence if it is voluntarily given."¹⁹

How (and why) did the drastic transformation of the President's 1967 anti-crime bill come about?

By the time the president sent his bill to the Congress (S. 917), Senator John McClellan, who was to chair the Senate subcommittee hearings on the bill, had already prepared and introduced several anti-crime measures of his own.²⁰ Among them was a bill (S. 674) governing the admissibility of confessions in federal prosecutions, which became the aforementioned § 3501 and a bill (S. 675), dealing with wiretapping and electronic surveillance, which became the aforementioned Title III.²¹

Senator McClellan did not object to the Administration's bill, for he agreed that "[p]rograms to better train and equip our police personnel are needed."²² But he did not believe the Administration's bill went far enough:

The war on crime must be waged on many fronts . . . Court decisions that . . . protect and liberate guilty and confirmed criminals to pursue and repeat their nefarious crimes should be reversed and overruled.

. . . .

[N]o matter how much money we appropriate for local police departments, we will not have effective law enforcement so long as the courts allow self-confessed killers to go unpunished. The confusion and disarray injected into law enforcement by such decisions as . . . *Escobedo* . . . and *Miranda* . . . are deplorable and demoralizing.²³

Senator Sam Ervin was sympathetic. Because S. 674 was "directed at the unjustified handicaps placed upon law enforcement officers and trial courts" by *Escobedo* and *Miranda*, two Supreme Court deci-

deleted on the Senate floor. See *id.*; Michael A. LaFond, Note, *Survey of Title II: Omnibus Crime Control and Safe Streets Act of 1968*, 18 AM. U. L. REV. 157, 158-67 (1968).

¹⁶ See *infra* text accompanying notes 43-56.

¹⁷ See *supra* note 3.

¹⁸ See *supra* note 4.

¹⁹ 18 U.S.C. § 3501(a) (1994).

²⁰ See *Hearings on S. 674, S. 917, S. 675 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong. 2-3 (1967) (statement of Senator McClellan) [hereinafter *Senate Hearings*].

²¹ See *id.* at 74, 75.

²² 114 CONG. REC. 11,200 (1968).

²³ *Id.* at 11,200-1. To the same effect is S. REP. NO. 90-1097, at 33, 37 (1968).

sions that "stretched the [F]ifth and [S]ixth [A]mendments far beyond their true meaning,"²⁴ Ervin "favor[ed] the substance" of McClellan's bill.²⁵ But Ervin, who some called "the Senate's leading expert on constitutional law,"²⁶ doubted that the problem caused by the confession rulings could be corrected by "a simple legislative enactment":²⁷

It is true that the *Miranda* opinion invites legislative action on the subject of police interrogation practices. However, the restrictions set forth in that decision and the *Escobedo* decision are said to be required by the Constitution, and hence any legislative enactment might be deemed by the Supreme Court to be unconstitutional to the extent that it failed to embody rules of police conduct at least as restrictive as those in the *Miranda* and *Escobedo* decisions.²⁸

A short time later, he put it more strongly: "[T]he way I interpret the majority opinion in the *Miranda* case, the majority did give Congress permission to legislate in this field, provided that the requirements which Congress might impose were at least as strict as those imposed by the Court in the *Miranda* case."²⁹

For this reason Senator Ervin had introduced a joint resolution proposing a constitutional amendment (cosponsored by fifteen colleagues) providing (a) that "the sole test" for the admissibility of a confession or incriminating statement in any court "shall be whether or not it was voluntarily made," and (b) that neither the Supreme Court nor any other federal court shall have jurisdiction to reverse or "otherwise disturb" a ruling by any state or federal court admitting a confession as "voluntarily made" if the ruling "is supported by competent evidence."³⁰ However, since introducing the proposed constitutional amendment, Senator Ervin had "come to the conclusion" that there was "a more direct route" to "rectify the problem" caused by the Warren Court: Congress had the constitutional power to pass legislation removing the appellate jurisdiction of the federal courts to reverse or otherwise disturb rulings by federal trial courts admitting confessions as voluntarily made.³¹

²⁴ *Senate Hearings*, *supra* note 20, at 4 (statement of Senator Ervin).

²⁵ *Id.*

²⁶ HARRIS, *supra* note 10, at 31. Another commentator put it somewhat differently. He remarked that Ervin "had read more Supreme Court decisions and agreed with less than any other member of the Senate." FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 245 (1970).

²⁷ *Senate Hearings*, *supra* note 20, at 4 (statement of Senator Ervin).

²⁸ *Id.*

²⁹ *Id.* at 181.

³⁰ 113 CONG. REC. 1173-74 (1967); *accord* *Senate Hearings*, *supra* note 20, at 4-5.

³¹ *Senate Hearings*, *supra* note 20, at 5 (statement of Senator Ervin); *accord* S. REP. NO. 90-1097, at 37-38 (1968).

Thus, announced Ervin, he was introducing a bill to this effect.³² The bill would also remove the jurisdiction of the Supreme Court and the lower federal courts to overturn or otherwise disturb a ruling by a state trial court that a confession was voluntary "if such ruling ha[d] been upheld by the highest appellate court of that State."³³

Senator Ervin stated,

I hated to take the course, but I felt it was the only practical course available. If we passed a law to overcome [*Escobedo* and *Miranda*], since they are based on constitutional grounds, the courts would say our law is unconstitutional.

....

... I introduced [the bill] as the only practical and immediate way of granting some protection to society in this matter.³⁴

When Title II was reported out of committee, Senator Ervin's provision, limiting the jurisdiction of the Supreme Court and all federal courts, caught heavy fire from law professors.³⁵ To give but a few examples:

Harvard Law Professor and former Solicitor General Archibald Cox emphasized that the power of the Supreme Court to reverse state convictions under the Fourteenth Amendment has been "necessary to prevent shocking travesties on justice" and that the Court's effectiveness in continuing to do so "depends upon its power to determine for itself whether fundamental rights were denied."³⁶ William Cohen, then a member of the UCLA law faculty, pointed out that, if enacted, the Ervin provision "would mark the first time in our history that a jurisdictional statute has been used to control the merits of the future decisions of all federal courts."³⁷ Louis Pollack, then Dean of the Yale Law School, protested that "depriv[ing] federal courts, including the Supreme Court, of authority to review the voluntariness of confessions admitted [in] state criminal trials . . . would destroy one of America's firmest bulwarks against barbarous forms of law-enforcement."³⁸

Still stronger criticism came from Francis Allen, then the Dean of the University of Michigan Law School:

³² See *Senate Hearings*, *supra* note 20, at 5 (statement of Senator Ervin).

³³ *Id.*

³⁴ *Id.* at 193.

³⁵ All the law professors' comments on Title II appeared in letters to Senator Joseph Tydings who had sought the views of law faculty members. Over 200 law professors and law school deans responded. See *infra* text accompanying notes 95-96. Apparently, no law professor or law school dean was asked to testify at the Senate subcommittee hearings and none did testify. See *infra* text accompanying notes 92-93.

³⁶ 114 CONG. REC. 13,857 (1968).

³⁷ *Id.* at 13,852.

³⁸ *Id.* at 13,865.

Stripping the Court of jurisdiction in certain types of cases because members of Congress happen to disagree with the Court's view of the constitutional commands is a step down a road that leads to a fundamental alteration in the distribution of powers in the American system. . . . I regard Title II as fully as ominous an assault on the Supreme Court as the court-packing proposals of the 1930's. In some respects it may be a more insidious threat, for it is less forthright and candid, and its dangers less apparent to the public at large.³⁹

It is true that the provision depriving the federal courts of appellate jurisdiction to review decisions admitting confessions into evidence, as well as another provision in Title II divesting federal courts of authority to review state convictions in habeas corpus proceedings, were deleted by the full Senate.⁴⁰ But the fact that these provisions were reported out of committee says a good deal about the intensity of the hostility McClellan, Ervin and their supporters on the Judiciary Committee felt toward the Warren Court—and the strength of their determination to chasten that Court.

The same may be said for the Senate Judiciary Committee's response to *United States v. Wade*,⁴¹ a case decided in June of 1967, when Senator McClellan's subcommittee "was in the final throes of marshaling its testimony and indignation against the Supreme Court's interrogation decisions."⁴² *Wade* held that a pre-trial lineup was a "critical stage" of a criminal prosecution and that if defendants were identified at such a lineup without being afforded the opportunity to be represented by counsel at this confrontation, any subsequent identifications in the courtroom were inadmissible unless the prosecution could "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."⁴³

"The problem here," as Professor Francis Allen has observed, "is not that of releasing an obviously guilty defendant because of the system's failure to respect his rights."⁴⁴ Rather it "is one of convicting

³⁹ *Id.* at 13,860.

⁴⁰ See BRECKENRIDGE, *supra* note 10, at 89-90; GRAHAM, *supra* note 26, at 328-29; HARRIS, *supra* note 10, at 89-90; OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 144 & n.72 (1973). Even here, however, "[t]he hard core of the Republican-southern Democratic bloc held firm. Thirty-two voted to deny appellate jurisdiction. They lost, however, with fifty-two Senators unwilling to curtail the Court's jurisdiction." BRECKENRIDGE, *supra* note 10, at 90 (footnote omitted).

⁴¹ 388 U.S. 218 (1967). The Court also decided two other pretrial identifications the same day: *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967).

⁴² GRAHAM, *supra* note 26, at 309.

⁴³ *Wade*, 388 U.S. at 240.

⁴⁴ Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. REV. 518, 542.

the innocent" because "[s]tudies reveal that misidentification may well be the greatest peril confronting the innocent person caught up in the criminal process."⁴⁵ As Justice William Brennan, author of the majority opinion in *Wade*, put it: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."⁴⁶

Nevertheless, the Judiciary Committee's response was similar to its response to *Miranda*; it pretended that the disliked opinion was never written and simply reinstated the law that prevailed before the opinion was handed down.⁴⁷ Thus § 3502 (as it was finally numbered⁴⁸), another amendment by Senator Ervin,⁴⁹ declared simply that, regardless of whether the defendant was previously identified at a lineup improperly held in the absence of counsel, "[the] testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible" in any federal prosecution.⁵⁰

Nor was that all. Another portion of the Ervin amendment provided that

neither the Supreme Court nor any [federal] court . . . shall have jurisdiction to review, reverse, . . . or disturb in any way a ruling of [a state] court . . . admitting in evidence . . . the testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is tried.⁵¹

This subsection of Title II was deleted by the full Senate,⁵² but the legislative repeal of the *Wade* decision in federal prosecutions passed by a 3-1 margin.⁵³ "It exists on the books," observed Judge Carl McGowan some thirty years ago, "more as the expression of a legislative hope than as a binding rule of decision, and it will presumably continue in this posture until the Supreme Court, if it ever does, overrules or modifies its identification decision."⁵⁴

⁴⁵ *Id.*

⁴⁶ *Wade*, 388 U.S. at 228.

⁴⁷ According to GRAHAM, *supra* note 26, at 309, *Wade* might have escaped the attention of the Congress "if it had not been announced at the height of the backlash against the *Miranda v. Arizona* ruling."

⁴⁸ See 18 U.S.C. § 3502 (1994).

⁴⁹ See HARRIS, *supra* note 10, at 59. According to Harris, although Senator McClellan had promised the White House that he would stop Senator Ervin from adding indiscriminately to the bill, ". . . McClellan did nothing when, time after time, Ervin put a hand into his pocket, saying, 'I got a little amendment here,' and offered it." *Id.* at 57.

⁵⁰ See 114 CONG. REC. 14,177 (1968). See also BRECKENRIDGE, *supra* note 10, at 71 (providing the full text of the bill).

⁵¹ 114 CONG. REC. 14,177.

⁵² A motion to strike this subsection passed by a 51-30 vote. See *id.* at 14,181.

⁵³ A motion to strike this subsection failed, 63-21. See *id.* at 14,180.

⁵⁴ Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 225, 249 (1970). According to Judge McGowan, "the . . . federal courts have

In *Wade*, as in *Miranda*, the Court raised the possibility of alternative safeguards: "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings . . . may also remove the basis for regarding the pretrial lineup stage as 'critical.'"⁵⁵ But Congress "contented itself with simply attempting a legislative repeal of the Court's decision without offering anything to deal with the critical problem the Court had identified."⁵⁶

The Senate passed its crime bill on May 23, 1968 by a huge margin.⁵⁷ The previous August the House had passed the Administration's crime bill unencumbered by the many titles and provisions that were to be tacked on to the bill by the Senate. Congressman Emanuel Celler, who chaired both the House Judiciary Committee and the subcommittee which held hearings on the crime bill, had managed to resist all efforts to add anti-Court amendments to the bill.⁵⁸

On June 5, 1968, two weeks after the Senate had passed its crime bill, the House met to consider it. A distraught Emanuel Celler called the bill a document "adopted through fear" and "a cruel hoax on citizens for whom crime and the fear of crime are facts of life."⁵⁹ He warned that "[a] general dissatisfaction with the Supreme Court is no basis for striking out blindly."⁶⁰ But Celler's plea that the Senate bill be sent to conference rather than be accepted without further delay met a cold reception.

It did not help that June 5, 1968, the day that the House began consideration of the Senate bill, was also the day that Senator Robert F. Kennedy had been fatally wounded by an assassin's bullet.⁶¹ Thus, as one Congressman observed on the second day of the House debate on the Senate bill, "we meet on a day, or two days, marked by anxiety, grief, anger and hostility."⁶²

A number of Congressmen cited the assassination of Senator Kennedy as a reason for prompt action—a reason for pushing the

considered themselves bound by the Supreme Court's reading of the Constitution rather than that of the Congress and have appeared to ignore the new statute." *Id.*

⁵⁵ *Wade*, 388 U.S. at 239.

⁵⁶ Allen, *supra* note 44, at 542.

⁵⁷ After votes on motions to strike various provisions had been taken (and some of these motions did pass, see BRECKENRIDGE, *supra* note 10, at 86-93; HARRIS, *supra* note 10, at 82-90), on May 23 the roll was called for a vote on the entire 134-page bill. "By this time, no one was surprised that the bill passed easily, but just about everyone was stunned by the overwhelming margin—seventy-two to four." HARRIS, *supra* note 10, at 98.

⁵⁸ See BRECKENRIDGE, *supra* note 10, at 50-54, 67; HARRIS, *supra* note 10, at 55-57.

⁵⁹ 114 CONG. REC. 16,066 (1968).

⁶⁰ *Id.*

⁶¹ The Senator died the following day. See HARRIS, *supra* note 10, at 107.

⁶² 114 CONG. REC. 16,283 (statement of Rep. Kastenmeier)

Senate bill through the House without a conference.⁶³ One member of the House went so far as to say that he felt the courts' "attitude of protecting criminals" may have "directly contributed" to the assassination of Senator Kennedy.⁶⁴ Congressman John Dow may have voiced the private thoughts of many of his colleagues, as well as his own views, when he explained why he was voting for the Senate bill:

This bill, as now amended, I regret exceedingly, and will only vote for it because of the widespread desire of all our people to curb crime and prevent continuation of violence in our land. As the price for this, we are saddled with amendments that threaten our liberties and may remain to haunt us.

I am voting for this measure out of deference to so many expressions from constituents in my district who regard protection in our streets as their paramount anxiety today.⁶⁵

Whatever the reasons, the mood of the House was such that it voted 317 to 60 against a conference and then 369 to 17 in favor of accepting the Senate version in toto.⁶⁶

B. The Tone of the Senate Debate on Title II

As Professor Otis Stephens noted in his book-length study of the Supreme Court and confessions: "In the aftermath of *Miranda v. Arizona*, an array of Supreme Court critics, in and out of Congress, insisted on linking the new interrogation requirements with what they described as an unparalleled national crisis in crime control and law enforcement."⁶⁷ In newspaper editorials, as well as in legislative halls, *Miranda* was charged with wreaking havoc and the Warren Court accused of "'coddling criminals,' 'handcuffing police,' and otherwise

⁶³ See 114 CONG. REC. 16,072 (statement of Rep. Cahill), 16,280 (statement of Rep. Skubitz), 16,281 (statements of Reps. Monagan and Blanton), 16,282 (statement of Rep. Conte), 16,284 (statement of Rep. Helstoski), 16,287 (statement of Rep. Patten), 16,288 (statement of Rep. McClory), 16,294 (statement of Rep. Minish), 16,295 (statement of Rep. Fisher), 16,297 (statement of Rep. Pollock). However, one member of the House, Ryan, deemed it "highly inappropriate for the House to use the time of the tragic murder of Robert Kennedy as the occasion to enact an unwise measure," and he "question[ed] whether we should be legislating at all on this dark day." See *id.* at 16,294.

Representative Kastenmeier noted that Kennedy had "neither voted for nor voiced support for this legislation" and that "[o]n the record he opposed many of the provisions in the [Senate] bill." *Id.* at 16,283. The day after Senator Kennedy died, Peter Edelman, who had served as the Senator's legislative assistant, "angrily criticized" the attempt of some proponents of the Senate crime bill "to cash in on the tragedy, pointing out that the bill 'contains measures that Robert Kennedy very deeply opposed'—in particular, Titles II and III." HARRIS, *supra* note 10, at 108.

⁶⁴ See 114 CONG. REC. 16,076 (statement of Rep. Flynt).

⁶⁵ 114 CONG. REC. 16,287. Dow was a Democrat from upstate New York. See HARRIS, *supra* note 10, at 108.

⁶⁶ See BRECKENRIDGE, *supra* note 10, at 93-94; HARRIS, *supra* note 10, at 106-08.

⁶⁷ STEPHENS, *supra* note 40, at 165.

undermining 'law and order' at the very time when police faced their most perilous and overwhelming challenge."⁶⁸

Section 3501 and other provisions of Title II were written and debated against this general background. As Fred Graham, then the Supreme Court correspondent for the *New York Times*, observed, "[w]hen Title II burst from the relative obscurity of the Senate Judiciary Committee onto the Senate floor in April of 1968

it was immediately seen as a bald Congressional attempt to rap the Supreme Court's knuckles over crime. Its provisions read like a catalogue of familiar grievances against the Warren Court:

First, it purported to reverse *Miranda* . . . [in] Federal trials. . . . Second, it included the similar effort to overrule *United States v. Wade*. . . . These two sections applied only to Federal courts, but it was assumed that state legislatures would pass similar laws if these were to get by the Supreme Court. Third, it overturned *Mallory*. . . . Fourth, it abolished the jurisdiction of the Federal courts to review state convictions in habeas corpus proceedings. Fifth, it stripped away the jurisdiction of the Supreme Court and all other [federal] courts to overturn a state court's finding that a confession was voluntary or a . . . trial court's holding that an eye-witness identification was admissible.

Nothing quite so irregular had ever been aimed at the Supreme Court by Congress before. It was essentially an attempt to use a statute to reverse a string of Supreme Court decisions, most of which had been interpretations of the Constitution. . . . The supporters of Title II made little effort to disguise their intent to black-jack the Court into changing its course. In private, Senator McClellan called it "my petition for a rehearing" on *Miranda*. . . . [As the Senate Judiciary Committee] explained, "the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The Committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that the legislation would be upheld."

Those were the sentiments of a committee that was dominated by Southern senators who had been nursing hurt feelings over the

⁶⁸ *Id.*; see also Kenneth C. Stephan, Comment, *Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics*, 48 NEB. L. REV. 193, 217 (1968). Stephan states:

Title II was inserted into the Omnibus Crime Bill at a time when the Gallup Poll showed that sixty-three percent of the public felt that courts were too lenient on criminals, compared to forty-eight percent who held that opinion in 1958. The bill had been enacted in a year when the issue of "law and order" was a key focal point of political campaigns, with many candidates mentioning the Supreme Court as a factor related to the increase of crime.

school desegregation decision of 1954 and who wanted to take it out on the Supreme Court over crime.⁶⁹

Graham characterized Title II as "a piece of dubious statesmanship designed more to chastise the Supreme Court than to improve the law."⁷⁰ Another close observer of the debate over Title II, Professor Robert Burt, put it more strongly: "Title II was, to an important degree, a gesture of defiance at a Court which protected criminals and Communists, and attacked traditional religious, political, and social institutions."⁷¹

During the debates on Title II, Senator John McClellan told his colleagues that "the tone is set at the top" and that "the Supreme Court has set a low tone in law enforcement."⁷² As already noted, Senator McClellan chaired the Senate subcommittee hearings on Title II and drafted some of the Crime Bill provisions. He also managed the Judiciary Committee's bill. Moreover, McClellan dominated both the subcommittee hearings and the debates on the Senate floor. One

⁶⁹ GRAHAM, *supra* note 26, at 319-20 (quoting S. REP. NO. 90-1097, at 51 (1968)). Graham's reference to the *Mallory* case is to *Mallory v. United States*, 354 U.S. 449 (1957), discussed in *supra* note 7. As pointed out there, because—unlike *Miranda*—the *McNabb-Mallory* rule was fashioned in the exercise of the Court's supervisory powers over federal criminal justice, it was subject to repeal by Congress.

As for Senator McClellan saying in private that Title II was his "petition for rehearing" in the *Miranda* case, he pretty much said the same thing in public. Consider the following remarks by McClellan:

... It would be my hope that we could avoid the long process of a constitutional amendment, and that we would find it unnecessary to limit the court's jurisdiction. It would be my further hope that we could make such a record here of recorded counsel and opinion of learned jurists and legal minds that Congress could enact a bill comparable to that which I have introduced, with such a strong majority that it would invite and induce the Court to reconsider its opinion in the *Miranda* case, and thus find the bill to be constitutional.

Some may say that it is a forlorn hope. But there is an old adage that wise men change their minds, and I do believe that some of these five men, one or more of them, are wise. . . .

S. REP. NO. 90-1097, at 194.

As for Graham's comment that the Senate Judiciary Committee was dominated by senators "nursing hurt feelings over the school desegregation decision of 1954," consider, too, the observations of former Attorney General Nicholas deB. Katzenbach:

I suppose it was almost inevitable that "law and order" got mixed up with civil rights. It had been, after all, the plea of the white segregationist. To compound the connection, "law and order" was also the catchword of Barry Goldwater—who voted against the 1964 [Civil Rights] Act—and George Wallace—the segregationist hero—in the 1964 and 1968 Presidential campaigns. It was, too, Senators McClellan and Ervin and Thurmond—fervent segregationists and strong critics of the Court's civil-rights decisions—who led the legislative battle to curb the Court on criminal procedure.

Nicholas deB. Katzenbach, *Introduction*, in HARRIS, *supra* note 10, at 1, 11.

⁷⁰ GRAHAM, *supra* note 26, at 319.

⁷¹ Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 127.

⁷² 114 CONG. REC. 14,146 (1968).

might say that as far as the congressional battle over Title II was concerned, Senator McClellan "set the tone at the top," and he set it very low indeed. The depth of his anger at the Court and the intensity of his emotion-charged language is evident in many of his statements, as the following examples demonstrate:

[The] tone is set at the top. The Supreme Court has set a low tone in law enforcement, and we are reaping the whirlwind today. Look at [the crime graph] chart. Look at it and weep for your country. Crime spiraling upward and upward and upward. Apparently nobody is willing to put on the brakes. I say to my colleagues today that the Senate has the opportunity—and the hour of decision is fast approaching⁷³

* * *

[I]f this confessions provision is defeated, the law-breaker will be the beneficiary, and he will be further encouraged and reassured that he can continue a life of crime and depredations profitably with impunity and without punishment. . . . [If Title II is defeated] every gangster and overlord of the underworld; . . . every murderer, rapist, robber . . . will have cause to rejoice and celebrate.

Whereas, if it is defeated, the safety of decent people will be placed in greater jeopardy and every innocent, law-abiding . . . citizen in this land will have cause to weep and despair.⁷⁴

* * *

Today, why should a policeman go out and risk his life to catch a known murderer or criminal who is armed with a gun, when the Supreme Court will find some small technicality . . . to find a way to turn that murderer or criminal loose and then, [in its decisions], attack the officer who risked his life and reflect upon his integrity, by inferring that we cannot trust a policeman to do right. . . . That is their attitude.⁷⁵

* * *

Under the Court's logic in the *Miranda* case, the day may come when a parent cannot ask his child about any harm the child has committed upon his mother without the parent giving him a warning that anything the child says may be used against him. Should fathers and mothers be required [to give the *Miranda* warnings] before they ask a child about an act that may be criminal . . . [?]⁷⁶

⁷³ *Id.* Fred Graham informs us that when Senator McClellan urged the need for and desirability of Title II, he "propped up in the rear of the Senate chamber a huge facsimile of the F.B.I.'s crime graph. The titles of key Supreme Court decisions were marked at the peaks along the rising line, to show the embarrassing parallel between Supreme Court activity on behalf of defendants and the crime rise." See GRAHAM, *supra* note 26, at 12. For criticism of the use (or one should say, misuse) of crime statistics by Senator McClellan and other politicians, see Yale Kamisar, *How to Use, Abuse—and Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972).

⁷⁴ 114 CONG. REC. 14,155; see also S. REP. NO. 90-1097, at 41, 46.

⁷⁵ 114 CONG. REC. 13,389.

⁷⁶ *Id.* at 13,846.

* * *

[T]he spiraling rate of crime that now plagues our Nation and endangers our internal security will continue unabated—even worsen—so long as this rigid and arbitrary prohibition against the admission into evidence of voluntary confessions by criminals is imposed on the processes of justice. As chosen representatives of our people we have a duty to do something about it.⁷⁷

* * *

It was not the Constitution that changed. It was five members of the Court [in *Miranda*] who undertook to change the Constitution

This is nothing less than an usurpation by the Court of the power to amend the Constitution. That power is not reposed in the Court by the Constitution.

It is that usurpation of power and its exercise that we are truly trying to correct.⁷⁸

* * *

I wholeheartedly agree that [changes in the Constitution should be made by constitutional amendment]. We are here protesting and trying to rectify 5-4 court decisions which have had the effect of amending the Constitution—a power the Supreme Court does not have under the Constitution.⁷⁹

Throughout the subcommittee hearings and the debates on the senate floor, Senator Sam Ervin proved to be McClellan's chief lieutenant. He, too, had drafted some of the provisions contained in the Judiciary Committee's Crime Bill.⁸⁰ As we have seen, at first Ervin had balked at attempting to overturn *Miranda* by legislation. But then Ervin threw himself into the battle with considerable gusto:

If you believe that the people of the United States should be ruled by a judicial oligarchy composed of five Supreme Court Justices rather than by the Constitution of the United States, you ought to vote against Title II. If you believe that self-confessed murderers, rapists, robbers, arsonists, burglars, and thieves ought to go unpunished, you ought to vote against Title II. . . . But if you believe, as the Senator from North Carolina believes, that enough has been done for those who murder and rape and rob, and that something ought to be done for those who do not wish to be murdered or raped or robbed, then you should vote for Title II.⁸¹

* * *

[W]hen the Supreme Court takes the words of the Constitution and attributes to them a meaning which allows self-confessed mur-

⁷⁷ *Id.* at 13,847.

⁷⁸ *Id.* at 13,846.

⁷⁹ *Id.* at 13,849.

⁸⁰ See HARRIS, *supra* note 10, at 31.

⁸¹ 114 CONG. REC. 14,155.

derers and rapists and arsonists . . . to go free of justice, then I think it is time for us to do something because we are the only power on earth which can do anything to protect American people against decisions like this, decisions which constitute a usurpation of power denied to the majority of the Supreme Court by the very instrument they profess to interpret.⁸²

* * *

All I can say is that the majority of the Supreme Court, in the *Miranda* case, . . . evidently wedded themselves to the strange theory that no man should be allowed to confess his guilt, even though the Bible says, even though psychiatrists assert, and even though those interested in the rehabilitation of prisoners declare that an honest "confession is good for the soul." Hence, they invented rules in the *Miranda* case to keep people from confessing their crimes and sins. The wisest of men could not have devised more efficacious rules to accomplish this object had he pondered the question a thousand years.⁸³

As the Senate debate on the Crime Bill intensified, Republican presidential candidate Richard M. Nixon issued his position paper on crime, *Toward Freedom from Fear*.⁸⁴ This paper demonstrated that when it came to using the Court as a scapegoat for the crime and violence that beset the nation, Mr. Nixon yielded neither to Senator McClellan nor Senator Ervin nor any other Democratic politician. Nixon urged Congress to pass the bill overturning *Escobedo* and *Miranda* and restoring the voluntariness test as a way to "redress the imbalance" caused by these decisions—a way to offset the blow suffered by "the peace forces in our society."⁸⁵

In the last seven years while the population of this country was rising some ten percent, crime in the United States rose a staggering 88 percent.

. . .

[A] contributing cause of this staggering increase is that street crime is a more lucrative and less risky occupation than it has ever been in the past. Only one of eight major crimes committed now

⁸² *Id.* at 12,475.

⁸³ *Id.* at 14,030. Senator Ervin also stated at the subcommittee hearings that "neither the Congress, nor the Supreme Court nor anybody else could ever be smart enough to devise any rules more calculated to prevent anybody from ever confessing their guilt than those that are laid down in the *Miranda* decision." *Senate Hearings, supra* note 20, at 196 (statement of Senator Ervin). Consider, too, his statement at the hearings that *Miranda* "not only handicaps law enforcement, not only weighs the scales of justice in favor of the criminal and against society and the victims of crime, but, by discouraging the making of confessions, it even denies the man the benefit of the therapeutic value of an honest confession." *Id.* at 256.

⁸⁴ The text of presidential candidate Nixon's position paper on crime, dated May 8, 1968, is set forth at 114 CONG. REC. 12,936-39.

⁸⁵ *Id.* at 12,937.

results in arrest, prosecution, conviction and punishment—and a twelve percent chance of punishment is not adequate to deter a man bent on a career in crime. Among the contributing factors to the small figure are the decisions of a majority of one of the United States Supreme Court.

The *Miranda* and *Escobedo* decisions of the high court have had the effect of seriously ham stringing [sic] the peace forces in our society and strengthening the criminal forces.

From the point of view of the peace forces, the cumulative effect [of] these decisions has been to very nearly rule out the "confession" as an effective and major tool in prosecution and law enforcement.

...

From the point of view of the criminal forces, the cumulative impact of these decisions has been to set free patently guilty individuals on the basis of legal technicalities.

The tragic lesson of guilty men walking free from hundreds of courtrooms across the country has not been lost on the criminal community.

...

The balance must be shifted back toward the peace forces in our society and a requisite step is to redress the imbalance created by these specific decisions. I would thus urge Congress to enact proposed legislation that—dealing with both *Miranda* and *Escobedo*—would leave it to the judge and the jury to determine both the voluntariness and the validity of any confession.

...

[I] think [the Warren Court's criminal procedure decisions] point up a genuine need—a need for future Presidents to include in their appointments to the United States Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land.⁸⁶

Senator Karl Mundt, who asked and obtained unanimous consent to print Nixon's position paper in the *Congressional Record*, noted that "[m]uch of what the former Vice President discusses in his position paper is before us in the form of" the Crime Bill.⁸⁷ So Senator McClellan would have had his colleagues believe. One close observer of

⁸⁶ *Id.* at 12,936-8. For criticism of Mr. Nixon's 1968 position paper on crime, see Kamisar, *supra* note 73, at 241-42, 250-52. The "only one-in-eight crimes results in conviction" statistic is especially jolting—but highly misleading. Even if the conviction rate (the percentage of those held for prosecution who are found guilty) were 100 percent, only one reported crime in six would result in a conviction, because only one reported crime in six leads to a criminal prosecution. The great bulk of reported crimes never lead to an arrest. See *id.* at 251-52.

⁸⁷ 114 CONG. REG. 12,936.

the Senate debate opined that "McClellan's most eminent supporter turned out to be Richard Nixon."⁸⁸

C. The Senate Subcommittee Hearings on Title II and the Senate Judiciary Committee Report

During the debate on the Senate floor, Senators Ervin and McClellan repeatedly referred to the transcript of the McClellan subcommittee hearings for overwhelming evidence of the heavy blow the Warren Court's confession rulings had dealt law enforcement and the strong need to right the situation by overturning the rulings.⁸⁹ Unfortunately, when it came to open-mindedness and fair play, Senator McClellan's subcommittee hearings left a great deal to be desired. As one close student of Title II pointed out, "the familiar claims of a direct connection between the enlargement of procedural requirements and a rising crime rate were repeated by a parade of district attorneys, police chiefs, and other representatives of what might be called the 'law enforcement lobby.'"⁹⁰ Senator McClellan himself noted (with evident pride) that the record of his subcommittee hearings "contains letters from 122 chiefs of police in 37 States."⁹¹

When Senator Joseph Tydings, who led the opposition to Title II in the Senate, charged that not a single constitutional law professor or criminal law professor had been given an opportunity to testify before Senator McClellan's subcommittee on the wisdom or constitutionality of this proposal,⁹² McClellan did not deny it. He responded simply that every member of the Senate had been invited to testify and that a

⁸⁸ HARRIS, *supra* note 10, at 73.

⁸⁹ See, e.g., 114 CONG. REC. 12,470, 14,019, 14,036, 14,141; see also S. REP. NO. 90-1097, at 46-48 (1968).

⁹⁰ STEPHENS, *supra* note 40, at 141.

⁹¹ 114 CONG. REC. 14,036.

⁹² See *id.* at 11,894, 11,901. However, one law professor, Fred E. Inbau, had been invited to, and did, express his views in writing. Professor Inbau, it should be noted, was co-author of a police interrogation manual that had been quoted at great length, and never with approval, in *Miranda*. See *Miranda v. Arizona*, 384 U.S. 436, 449-55 (1966). Moreover, Professor Inbau was greatly admired by many law enforcement officials for his articulation of police needs and concerns, and for his sharp criticism of various confession cases decided by the Supreme Court. See generally YALE KAMISAR, *Fred E. Inbau: "The Importance of Being Guilty,"* in POLICE INTERROGATION, *supra* note 3, at 95.

Finally, it should be pointed out that even Professor Inbau had "much doubt" about the constitutionality of a bill to abolish *Miranda*:

I am in thorough sympathy with the objectives of this bill and hope Congress will enact it although much doubt remains as to its constitutionality in view of . . . *Miranda* . . . If enacted into law [it] would at least afford an opportunity for the Supreme Court reconsideration of its 5 to 4 decision in the *Miranda* case. It is not inconceivable that a change in the composition of the Court in the next few years may result in a reexamination of the *Miranda* doctrine and perhaps in an overruling of that decision . . .

Senate Hearings, supra note 20, at 676 (statement of Professor Inbau).

person from Tydings' own state had also testified (the president of the Maryland district attorneys association).⁹³

The conspicuous absence of any law professors at the subcommittee hearings (or any defense lawyers or public defenders for that matter)⁹⁴ could hardly be attributed to a lack of interest by those in academia. When asked by Senator Tydings to state their views on the desirability of § 3501 and other anti-Court provisions and on the power of Congress to enact them, 212 law professors (including twenty-four law school deans) from forty-three law schools had responded.⁹⁵ Most attacked the constitutionality of the anti-*Miranda* provision; not a single one defended it.⁹⁶

Almost all of the law enforcement officials who appeared before the Senate subcommittee talked about both the need for and the constitutionality of Title II, thus telling McClellan, Ervin and their allies what they wanted, and expected, to hear. But the testimony of the most eminent witness to appear before the subcommittee, J. Edward Lumbard, Chief Judge of the U.S. Court of Appeals for the Second Circuit and Chairman of the ABA Special Committee on Minimum

⁹³ See 114 CONG. REC. 11,901.

⁹⁴ However, Lawrence Speiser, director of the Washington, D.C. office of the ACLU, did appear as a witness and did oppose the "attempt to overturn *Miranda* by legislation." *Senate Hearings*, *supra* note 20, at 1173.

⁹⁵ See 114 CONG. REC. 13,850.

⁹⁶ The full text of the law professors' and law school deans' letters to Senator Tydings appears in 114 CONG. REC. 13,851-67. A substantial number of professors concentrated their heaviest fire on another provision of the bill—one that would have denied the Supreme Court and any federal court the power to review state court determinations that a confession was voluntarily made. This provision was deleted by the full Senate.

Although many of the professors who responded to Senator Tydings's request attacked the wisdom and constitutionality of the provisions purporting to overrule *Escobedo*, *Miranda*, and *Wade* quite forcefully, perhaps the most devastating criticism of all came from one who wrote to the *New York Times* rather than to Senator Tydings. At a time when many believed that the anti-Court provisions of the Crime Bill called for its veto, Professor Herbert Wechsler, deservedly called "one of the most distinguished students of constitutional law in the country," CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 76 at 187 n.30 (3d ed. 1999), and one whose criticism of Title II "was especially weighty because he is unsympathetic with the *Miranda* decision," *id.*, reached the conclusion that "offensive as these sections are," they do not justify a veto of the bill because they are so likely to be held "constitutionally ineffective" that

[n]o responsible trial judge would jeopardize a criminal conviction by following the statute in his rulings on admissibility, nor would a sensible prosecutor even seek a ruling in these terms since it would certainly invite reversal.

It can, therefore, be predicted with confidence that the offensive sections of the bill would be dead letters even in the district courts.

Herbert Wechsler, *Letter to the Editor: Legislating Crime Control*, N.Y. TIMES, June 16, 1968, at B19.

Standards for Criminal Justice,⁹⁷ probably surprised and disappointed proponents of Title II.

A year earlier, Judge Lumbard had voiced his unhappiness with the approach the Supreme Court had taken in *Escobedo*.⁹⁸ And during his appearance before the subcommittee he made it clear he was not enamored of *Miranda*.⁹⁹ At one point he agreed that the self-incrimination clause would seem to have no bearing whatever on the admissibility of a confession that satisfied the traditional pre-*Miranda* voluntariness test (calling this his "own personal view").¹⁰⁰ At another point, he agreed that there is "no better evidence" of a person's guilt than his own voluntary confession.¹⁰¹ Nevertheless, Judge Lumbard balked at overturning *Miranda* by legislation.

He told the subcommittee that if Congress were unhappy with *Miranda* because it unduly hampered police efforts to apprehend criminals "the only way to correct the situation would be by amendment of the Constitution . . . we must apply the Constitution and the law as the Supreme Court has interpreted them."¹⁰² When asked specifically whether the much-quoted language in *Miranda* "encourag[ing] Congress and the States to consider their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our laws"¹⁰³ "opens the door for legislation [such as Title II] which would permit our avoiding the constitutional amendment process,"¹⁰⁴ Judge Lumbard answered, "No; I don't think it permits you to do that."¹⁰⁵ He added that Congress could not enact legislation that failed to do everything the Court said had to be done "[u]nless you can find some suitable substitute for the requirements laid down by the Supreme Court."¹⁰⁶

At this point, Senator McClellan made it plain that he was only interested in abolishing *Miranda*, not in finding a "suitable substitute" for it. He also left little doubt that he was well aware that abolishing *Miranda* by legislation would be a risky venture. Consider the following exchange:

⁹⁷ Judge Lumbard also had three terms of service in the office of U.S. Attorney for the Southern District of New York, the third term (from 1953-55) as head of the office. See *Senate Hearings*, *supra* note 20, at 170 (statement of Judge Lumbard).

⁹⁸ See J. Edward Lumbard, *New Standards for Criminal Justice*, 52 A.B.A. J. 431, 432 (1966).

⁹⁹ He subsequently made it still clearer in a law review article. See J. Edward Lumbard, *Some Consequences of the Criminal Justice Revolution*, 56 GEO. L.J. 645, 655-58 (1968).

¹⁰⁰ *Senate Hearings*, *supra* note 20, at 189, 190 (statement of Judge Lumbard).

¹⁰¹ *Id.* at 191.

¹⁰² *Id.* at 184.

¹⁰³ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

¹⁰⁴ *Senate Hearings*, *supra* note 20, at 195 (statement of Judge Lumbard).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 196.

SENATOR McCLELLAN. . . . If they [a majority of the Justices] base the *Miranda* decision strictly on constitutional issues, I don't understand how you could write a statute that did not do everything the Court has said must be done. And if you do that, you destroy everything that you seek to attain anyhow.

JUDGE LUMBARD. Unless you can find some suitable substitute for the requirements laid down by the Supreme Court

SENATOR McCLELLAN. They [a majority of the Justices] wouldn't accept it as suitable unless it accomplished the destruction that their decision does. They say it is based on the Constitution. I don't know how you can do it. They say you have got to do these things. Well, how can you do less if the Constitution requires that this be done?¹⁰⁷

In the Senate Committee on the Judiciary's report recommending that Title II be enacted into law, the committee maintained that "[t]he Supreme Court itself suggests" that Congress is free to overturn *Miranda* by statute and that Congress should accept this invitation because it "is better able to cope with the problem of confessions than is the Court."¹⁰⁸ With one exception, the Committee relied only on law enforcement officials and several U.S. Senators who had testified before the subcommittee.¹⁰⁹ The one exception was Judge Lumbard, even though, as we have seen, he appeared to have said just the opposite of what the committee wished to hear. How did this remarkable turn of events come about?

The Judiciary Committee Report took Judge Lumbard's testimony out of context. The Report quotes the judge as follows:

In my opinion, it is most important that the Congress should take some action in the important areas I have discussed. The legislative process permits a wide variety of views to be screened and testimony can be taken from those who know the facts and those who bear the responsibility for law enforcement.

The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decisions in particular cases where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.¹¹⁰

This testimony sounds as if Judge Lumbard was cheering on the Congress in its efforts to abolish *Miranda* by legislation, but only because the Judiciary Committee omitted both what the judge had told the subcommittee earlier and what he was to tell it later. Judge Lum-

¹⁰⁷ *Id.* at 196-97.

¹⁰⁸ S. REP. NO. 90-1097, at 46 (1968).

¹⁰⁹ *See id.* at 46-48.

¹¹⁰ *Id.* at 46 (emphasis added).

bard had pointed out earlier that the *Miranda* Court had not dealt with certain situations, such as what rules, if any, should apply when the police are questioning someone *not* in custody, e.g., interviewing a person in his own home with other family members present, telling Congress it should "feel free to state a policy and lay down appropriate rules regarding the admission of evidence" in these situations.¹¹¹ These were "the important areas" Judge Lumbard was talking about in the portion of his testimony quoted by the Judiciary Committee (areas for which the *Miranda* opinion had not provided definite answers) when he testified he thought it "most important that the Congress should take some action in the important areas I have discussed."¹¹²

If there were any doubts about what Judge Lumbard meant in the testimony quoted by the Committee Report, he resolved them later when responding to a question by Senator Hugh Scott:

No; I don't think [the language encouraging the Congress to establish other procedures which are equally effective in apprising suspects of their rights] permits you to do that [overturn *Miranda* without invoking the constitutional amendment process], but there certainly is a wide area which obviously the Court has not covered in its opinion in the *Miranda* cases, not only the matter of questioning before a person is in custody, but then the manner in which the defendant or suspect is handled while he is in custody, the way in which the warning is given, the record that is made, the presence of other people . . . these are obviously the next questions that are going to be raised in contested cases.

I think that this whole area is open to the Congress and . . . it would be most helpful and most important that Congress should attempt to deal with these areas, and lay down the rules and the standards so far as Federal cases are concerned.¹¹³

The Judiciary Committee Report was also less than honest in its treatment of the testimony of another federal judge who appeared at the subcommittee hearings: Judge Alexander Holtzoff, a federal district judge for the District of Columbia. The Committee assured the full Senate that Judge Holtzoff "sees no constitutional bar to congressional abrogation of the *Mallory* rule," quoting from his testimony.¹¹⁴ But when it discussed Congress's freedom to enact legislation overturning *Escobedo* and *Miranda*,¹¹⁵ the Committee omitted any reference to Judge Holtzoff's testimony, no doubt because this time he told

¹¹¹ See *Senate Hearings*, *supra* note 20, at 181-82 (statement of Judge Lumbard).

¹¹² S. REP. NO. 90-1097, at 46.

¹¹³ *Senate Hearings*, *supra* note 20, at 195-96 (statement of Judge Lumbard). A year later Judge Lumbard reiterated this point in a law review article. See Lumbard, *supra* note 99, at 658-59.

¹¹⁴ S. REP. NO. 90-1097, at 40.

¹¹⁵ See *id.* at 46-51.

the subcommittee that there was a constitutional bar to congressional action:

Of course, the *Escobedo* and the *Miranda* cases are in a different class [than *Mallory*] in one important respect. They are based on the Constitution. They hold that the Constitution requires these warnings. Therefore, it would take a constitutional amendment, unless the Supreme Court overrules itself, whereas, the *Mallory* rule being purely a procedural rule, can be changed by legislation.¹¹⁶

Those asked to testify at the Senate subcommittee hearings on the Crime Bill were those whose testimony was expected to advance the cause of the subcommittee's chairman, Senator John McClellan. As the Senate Judiciary Committee Report's treatment of testimony of Judges Holtzoff and Lumbard well illustrates, on those rare occasions when a witness said something that disappointed Senator McClellan, that testimony was misrepresented or simply ignored.

The legislative history of § 3501 makes it hard to take seriously an argument that proponents of the provision are bound to make in the Supreme Court—the Court should defer to Congress's superior fact-finding capacity. On this occasion at least, the much-vaunted superior fact-finding capacity of Congress was little in evidence. The legislative history of § 3501 also greatly impairs, if it does not destroy, other arguments that proponents of the provision are likely to make in the Supreme Court—that § 3501 takes into account the *Miranda* warnings or recognizes the central holding of *Miranda*¹¹⁷ or represents a "blend" of the old voluntariness test and the new *Miranda* decision. The last thing congressional proponents of § 3501 wanted to do was to pay respect to *Miranda*. They were determined to bury *Miranda*, not to recognize it.

D. Would the Justices Who Dissented in *Miranda* Have Upheld § 3501?

A final word about the subcommittee hearings. Throughout the hearings Senator McClellan made clear his assumption that the four justices who had dissented in *Miranda* would vote to uphold legislation overturning that former case, and thus he needed only one more vote to prevail:

[I]t may be a forlorn hope, but I should like to hope that if this legislation is enacted and its constitutionality is tested, only one Justice changing his position would sustain the law. That wouldn't be unheard of with respect to members of the Court.¹¹⁸

¹¹⁶ *Senate Hearings*, *supra* note 20, at 264 (statement of Judge Holtzoff).

¹¹⁷ In fact, the Fourth Circuit did maintain in *Dickerson* that § 3501 "did not completely abandon the central holding of *Miranda*." See *infra* text accompanying note 242.

¹¹⁸ *Senate Hearings*, *supra* note 20, at 180 (statement of Senator McClellan).

* * *

I understand they [the 5-4 majority] premised their decision in the *Miranda* case upon a constitutional ground

But there are only five of the nine judges that so held. I wonder if it is a forlorn hope . . . that one of them at least might be persuaded that they have gone a little too far.¹¹⁹

* * *

[I]f [the bill] became law and was taken to the Supreme Court, and the five still felt that under its previous decisions it is unconstitutional, it would still only take one wise man of the five to change his mind.¹²⁰

The Senate Judiciary Committee Report was even more emphatic on this point. The opinions of the four *Miranda* dissenters, the Committee assured the full Senate, "clearly indicate that neither of them would consider these provisions unconstitutional. Justice Harlan, it will be recalled, said the majority opinion 'represents poor constitutional law.'"¹²¹

But *nothing* in the *Miranda* dissents indicates that those who wrote or joined these opinions would uphold legislation purporting to overrule *Miranda*. Justice Harlan did say the *Miranda* decision "represents poor constitutional law."¹²² But there is a big leap between calling a Supreme Court decision unsound or poor constitutional law and concluding that therefore the decision can be overruled by mere legislation.

Justice White wrote an even more forceful dissenting opinion in *Miranda* than did Justice Harlan, but Justice White was not too angry to make the following observations:

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. . . . [W]hat [the Court] has done is to make new law and new public policy in

¹¹⁹ *Id.* at 264.

¹²⁰ *Id.*; see also *supra* note 69.

¹²¹ S. REP. NO. 90-1097, at 51 (1968). Justice Harlan did so describe *Miranda* at the outset of his dissenting opinion, see *Miranda v. Arizona*, 384 U.S. 436, 504 (1966), but the Committee seemed to assume that Harlan called the *Miranda* case "poor constitutional law," i.e., constitutionally suspect, rather than "poor constitutional law," i.e., mediocre constitutional interpretation. Nine months after the Crime Bill was signed by the president, Justice Harlan concurred in the result in *Orozco v. Texas*, 394 U.S. 324 (1969), a case that gave *Miranda* an expansive reading. "The passage of time ha[d] not made the *Miranda* case any more palatable" to him, *id.* at 323, but "purely out of respect for *stare decisis*," Justice Harlan "reluctantly" felt "compelled to acquiesce" in the Court's application of *Miranda*. *Id.* at 328.

¹²² *Miranda*, 384 U.S. at 504 (Harlan, J., dissenting).

much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.¹²³

On the basis of these comments alone, I think it fair to say that if the constitutionality of § 3501 had come before him when he was still a member of the Court, Justice White would have had little difficulty striking down the section. Nor is this the only evidence of Justice White's views.

A year after *Miranda* was handed down, Justice White spoke at the annual meeting of the Conference of Chief Justices. The Chairman of the Conference, Chief Justice Carleton Harris of the Supreme Court of Arkansas, had asked Justice White to talk about *Miranda* and he agreed to do so.¹²⁴ I venture to say that what Justice White told the chief justices of the states was not what most of them wanted to hear.¹²⁵

Is the arrested suspect, alone with the police in the station house, being "compelled" to incriminate himself when he is interrogated without proper warnings? Reasonable men may differ about the answer to that question, but the question itself is a perfectly straightforward one under the Fifth Amendment and little different in kind from many others which arise under the Constitution and which must be decided by the courts. No ready answer to *Miranda* can be found by reference to the text of the Constitution alone. The answer lies in the purpose and history of the self-incrimination clause and in our accumulated experience.

This kind of judicial decision making is inherent in our present governmental structure. All of you know it is, for you too are faced with the identical provisions and must decide the same questions. . . .

* * *

¹²³ *Id.* at 531 (White, J., dissenting).

¹²⁴ Justice White noted this at the outset of his talk. See Justice Byron R. White, Recent Developments in Criminal Law, Address Before the Nineteenth Annual Meeting of the Conference of Justices (Aug. 3, 1967), in COUNCIL OF STATE GOVERNMENTS, PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING OF THE CONFERENCE OF CHIEF JUSTICES (1967). I heard Justice White give the talk, but was unaware that it had been published in the proceedings of the conference until Barbara Garavaglia, Head of Reference, University of Michigan Law Library, found it for me.

¹²⁵ At the annual meeting of the state chief justices held a year earlier (two short months after *Miranda* was decided), I participated in four lively workshop sessions with a goodly number of the chief justices. As I reported shortly thereafter, on the basis of my conversations with various state chief justices I came away with the distinct impression that they were "overwhelmingly opposed" to the *Miranda* decision. See YALE KAMISAR, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, in POLICE INTERROGATION, *supra* note 3, at 237 n.1.

Of course, to say that the courts must decide a case like *Miranda* [] is one thing. The question of whether it is correctly or wisely decided is quite another. As a matter of constitutional interpretation, I disagreed with the result reached in that case and the reasons given for it and repeated my disagreement last term. But it is now the law and whatever its merits, it is plainly a derivative of *Malloy v. Hogan*, applying the Fifth Amendment to the States, and *Gideon v. Wainwright* which required counsel in most kinds of criminal cases. In terms of the function which the Court was performing, I see little difference between *Miranda* and the several other decisions, some old, some new, which have construed the Fifth Amendment in a manner in which it has never been construed before, or as in the case of *Miranda*, contrary to previous decisions of the Court and of other courts as well. Cases such as *Boyd v. United States*, 116 U.S. 616, and *Counselman v. Hitchcock*, 142 U.S. 547, immediately come to mind. I likewise consider extremely important the two cases of last term, *Garrity v. New Jersey* and *Spevack v. Klein*. In the first, *Garrity*, the Court held inadmissible, as compelled within the meaning of the Fifth Amendment, the statements of a city employee made in response to inquiries about his job performance and under threat of loss of employment. In *Spivack*, the Fifth Amendment was said to shield a lawyer from producing information at a disbarment hearing and to prevent his disbarment for such refusal.¹²⁶

II

WHAT CAN BE SAID FOR THE CONSTITUTIONALITY OF § 3501?

A. Arguments Made at the Time the Crime Bill Was Enacted

Although members of the Senate Judiciary Committee who read the *Miranda* opinion carefully or attended the Senate subcommittee hearings regularly had to know this was highly misleading, the Senate Report states that "[t]he Supreme Court itself suggests that Congress is free to enact legislation in this field," perhaps because of the "widespread notion that Congress is better able to cope with the problem of confessions than is the Court."¹²⁷ At another point, the Report states that "the committee feels that Congress . . . should respond to the majority opinion's invitation to Congress"¹²⁸ to continue its "laudable search for increasingly effective ways of protecting the rights of the

¹²⁶ White, *supra* note 124, at 42-43. The full citations to the cases cited by Justice White are, in order of cases cited: *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Boyd v. United States*, 116 U.S. 616 (1886); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

¹²⁷ S. REP. NO. 90-1097, at 46 (1968).

¹²⁸ *Id.* at 50.

individual while promoting efficient enforcement of our criminal laws.”¹²⁹

These remarks are jarring when one considers that this segment of the report never quotes *Miranda*'s caveat that “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice”¹³⁰ nor the caveat that “unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [*Miranda*] safeguards must be observed.”¹³¹

One is even more taken aback by the statements in the Senate Report about the Court's “invitation to Congress” to legislate in this field when one recalls these statements were made *despite*.

(a) Senator Ervin's realization that any legislation in this field would probably be unconstitutional to the extent that it failed to provide safeguards at least as effective as those imposed by the *Miranda* Court.¹³²

(b) Senator McClellan's awareness that § 3501 would be invalidated by the Supreme Court if the 5-4 *Miranda* majority adhered to its position.¹³³

(c) Chief Judge Lumbard's unequivocal testimony that Congress could not enact legislation in the area covered by *Miranda* unless it found “some suitable substitute” for the safeguards prescribed by the Court.¹³⁴

(d) Judge Holtzoff's unequivocal testimony that “it would take a constitutional amendment” to overturn *Miranda*, “unless the Supreme Court overrules itself”.¹³⁵

(e) Attorney General Ramsey Clark's statement to Senator McClellan that if the Crime Bill is “intended to dispense with the procedural safeguards established by *Miranda* or if it is designed to modify the constitutional standard of voluntariness, it would be in conflict with current constitutional requirements.”¹³⁶

¹²⁹ *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

¹³⁰ *Miranda*, 384 U.S. at 458.

¹³¹ *Id.* at 467.

¹³² See *supra* text accompanying notes 28-29, 34.

¹³³ See *supra* note 69 and text accompanying notes 118-20.

¹³⁴ See *supra* text accompanying note 107; see also *supra* notes 111-13 and accompanying text.

¹³⁵ See *supra* text accompanying note 116.

¹³⁶ *Senate Hearings*, *supra* note 20, at 357 (statement of Attorney General Clark). The Senate Report makes no mention of Attorney General Clark's statement. Nor does the Report make any reference to Judge Holtzoff's and Judge Lumbard's views that *Miranda* can not be overturned by legislation. However, the Report quotes from the testimony of both judges on other points.

It is unclear what would constitute a suitable substitute for *Miranda* safeguards. One possibility, suggested by Judge Lumbard himself at the Senate subcommittee hearings,¹³⁷ would be eliminating or greatly restricting police interrogation in favor of a system of judicial or judicially supervised questioning. Under the proposal, a suspect would be questioned either by or before a judicial officer, would have the assistance of counsel and would be informed that she need not answer any questions. But she would also be told that if subsequently prosecuted her refusal to answer questions at the earlier proceeding would be disclosed at trial.¹³⁸

Even before *Escobedo* and *Miranda*, as Justice Frankfurter once noted, this proposal was the one "most frequently made with the object of curbing third-degree methods by the police."¹³⁹

In the wake of *Miranda*, a number of commentators returned to this proposal and built upon it.¹⁴⁰ As I said of the proposal a quarter-century ago, a modernized version of it (i.e., a package providing for judicial warnings, judicial supervision of any ensuing interrogation, and video taping or audio taping of the entire proceeding) "would present an attractive alternative to the *Miranda* model."¹⁴¹

Another possible alternative to the *Miranda* warnings would be a system of video taping (or at least audio taping) the entire interrogation session in place of the warnings or in exchange for a shortened version of the warnings.

Arguing that "recording maintains, and in many ways exceeds, *Miranda*'s supposed benefits of deterring coercion and preventing false confessions" and "has the advantage over *Miranda* of not signifi-

¹³⁷ See *Senate Hearings*, *supra* note 20, at 197 (statement of Judge Lumbard).

¹³⁸ Paul Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932), seems to have been the first commentator to spell out the desirability of, and historical support for, such a procedure, as well as the first to marshal, and to evaluate with any degree of thoroughness, the policy and constitutional arguments against such a procedure. See YALE KAMISAR, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, in POLICE INTERROGATION, *supra* note 3, at 77. Would the comment on the suspect's refusal to answer questions at the pretrial proceeding pass muster? Compare Donald A. Dripps, *Foreword: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 730 (1988), and Phillip E. Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303, 309 (1986), with Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2670-72 (1996), and Marvin Frankel, *From Private Rights to Public Justice*, 51 N.Y.U. L. REV. 516, 531 (1976).

¹³⁹ *Culombe v. Connecticut*, 367 U.S. 568, 571 n.2 (1961) (plurality opinion).

¹⁴⁰ See, e.g., WALTER SCHAEFER, *THE SUSPECT AND SOCIETY* 76-81 (1967); Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713-16 (1968); Johnson, *supra* note 138. Cf. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858-59, 898-901, 908-09 (1995).

¹⁴¹ KAMISAR, *supra* note 138, at 83.

cantly impeding law enforcement,"¹⁴² Professor Paul Cassell has proposed a system of video taping police questioning and a modified set of warnings for the now-familiar *Miranda* warnings.¹⁴³ But this proposal has been sharply criticized by Professor Stephen Schulhofer, who maintains that it "strip[s] arrested suspects of their right to consult counsel during pre-arraignment interrogation, . . . eliminate[s] the requirement that interrogation be preceded by an explicit waiver of rights, and . . . eliminate[s] *Miranda's* requirement that interrogation cease if a suspect makes a clear request to break off questioning or to consult with counsel."¹⁴⁴

I think there is a good deal to what Schulhofer says. Nevertheless, I would award quite a few points to a system that requires law enforcement officers to tape whenever feasible how they address the suspect, how he responds and what occurs thereafter, how the police deliver whatever warnings they must give, how the suspect waives whatever rights he has, and all subsequent questioning and statements made in response.¹⁴⁵ Thus, whether legislation effectuating Cassell's proposal would pass constitutional muster is not an easy question.¹⁴⁶

However, whether something like Cassell's proposal or some other tape recording system is what the *Miranda* Court had in mind when it "encourage[d] Congress to continue" its "laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws"¹⁴⁷ is a question that need not detain us. Section 3501 does not contain a video taping or audio taping requirement, or anything else even arguably constituting an effective alternative to the *Miranda* safeguards.

¹⁴² Paul Cassell, *Miranda's Social Costs: An Empirical Assessment*, 90 NW. U. L. REV. 387, 486 (1996).

¹⁴³ See *id.* at 486-97. Professor Cassell, who has become the nation's leading critic of *Miranda*, was recently appointed by the U.S. Supreme Court to defend the constitutionality of § 3501 in the *Dickerson* case.

¹⁴⁴ Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 556, 556-60 (1996); see also Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 166-67 (1998).

¹⁴⁵ See YALE KAMISAR, *Brewer v. Williams—A Hard Look at a Discomfiting Record*, in POLICE INTERROGATION, *supra* note 3, at 113, 129-37.

¹⁴⁶ It is worth noting that testifying before the Senate Subcommittee on Separation of Powers shortly after Congress passed the Crime Bill and a few days before the President signed it, Professor Alexander Bickel, one of the leading constitutional law authorities of his time, opined that if Congress had enacted "a different set of means than those adopted by the [*Miranda*] Court"—had required that all police interrogations "be put on tape"—he found it "difficult to imagine that the Court would have stuck to its guns, that the Court would have said no, the very means we invented are necessarily constitutional, and Congress can't change them." *The Supreme Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong. 28 (1968) (statement of Professor Bickel) [hereinafter *Senate Hearings on Separation of Powers*].

¹⁴⁷ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

Section 3501 simply turns the clock back to the early 1960s, as if *Miranda* had never been decided.¹⁴⁸

It is hard to see how anyone can seriously argue that the *Miranda* Court encouraged or invited Congress to abolish *Miranda* in favor of the very test the Court had explicitly and emphatically found inadequate to protect the rights of suspects. As Professor Charles Alan Wright has said of § 3501: "It is one thing to devise alternative safeguards and quite another to provide, as the 1968 legislation does, that no safeguards are needed."¹⁴⁹

Another argument made in favor of § 3501 was that the *Miranda* Court had not only disregarded precedent, but "misconstrue[d] the Constitution."¹⁵⁰ Indeed, charged Senator McClellan, the *Miranda* Court had "usurp[ed]" "the power to amend the Constitution" and "[i]t is that usurpation of power and its exercise here that we are truly trying to correct."¹⁵¹ Congress, the argument went, had to "rectify 5-to-4 court decisions, which have had the effect of amending the Constitution"¹⁵² because (to quote Senator Ervin) Congress was the only body that "can do anything to protect American people against decisions like this, decisions which constitute a usurpation of power denied to the majority of the Supreme Court by the very instrument they profess to interpret."¹⁵³

This argument, too, need not detain us for very long. If Congress could overturn any Supreme Court interpretation of the Constitution it disliked simply by calling the disliked ruling a "usurpation" by the Court of the power to amend the Constitution, then the Constitution would no longer be "superior paramount law," but "on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it."¹⁵⁴

The most interesting argument on behalf of § 3501 made at the time the Crime Bill was being debated and enacted was that *Miranda* rested on an erroneous "factual assumption"—custodial interrogation

¹⁴⁸ Whether § 3501 constitutes a "blending" of the voluntariness and *Miranda* tests or whether it "recognizes" the *Miranda* rights is considered and rejected at *infra* text accompanying notes 242-74.

¹⁴⁹ WRIGHT, *supra* note 96, at 185.

¹⁵⁰ S. REP. NO. 90-1097, at 50 (1968).

¹⁵¹ 114 CONG. REG. 13,846 (1968); see also *supra* text accompanying note 78.

¹⁵² *Id.* at 13,849; see also *supra* text accompanying note 79.

¹⁵³ *Id.* at 12,475; see also *supra* text accompanying note 82. During the hearings before the Senate Subcommittee on Separation of Powers, hearings chaired by Senator Ervin and held just before the President signed the Crime Bill, Ervin made a somewhat different "usurpation" charge: "[T]he [*Miranda*] Court usurped the power of the legislature, the Court prescribed rules of conduct to govern all law-enforcement officers having an accused in custody, and in so doing it went clearly outside the words of the Constitution. . . ." *Senate Hearings on Separation of Powers*, *supra* note 146, at 28-29 (statement of Senator Ervin).

¹⁵⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), quoted with approval in *Boerne v. Flores*, 521 U.S. 507, 529 (1997).

is "inherently coercive"—and that therefore Congress could remove or correct *Miranda*'s unsound factual "underpinning" and reassert the traditional voluntariness test by "simple legislation."¹⁵⁵ As explained by Senator Ervin, when he chaired the Senate subcommittee hearings on separation of powers, the Legislative Reference Service memorandum "suggests that the cases [*Miranda* and *Wade*] are based upon false or unsound factual assumptions, and since these assumed facts don't really exist, the Congress can pass a statute based upon its own findings and do away with the rules notwithstanding that they were predicated on constitutional grounds."¹⁵⁶

As Professor Archibald Cox observed three decades ago, one response to

the finding-of-fact defense of [§ 3501] is that it rests upon a misconstruction of the *Miranda* decision. The opinion, fairly read, does not assert that police interrogation in the station house . . . is always coercive unless the stated rules or their equivalent are satisfied. Some of the language points in that direction . . . but the thrust of the argument [in *Miranda*] seems to be that unless prophylactic measures are employed there will be inadequate assurance that any confession obtained in secret is not procured by compulsion violating the privilege against self-incrimination. The emphasis was on the need for prophylactic rules rather than the compulsion present in every case.¹⁵⁷

¹⁵⁵ S. REP. NO. 90-1097, at 60, 63. At this point, the Senate Committee on the Judiciary is reprinting and incorporating into its report a memorandum by the American Law Division, Legislative Reference Service, Library of Congress. The memorandum, prepared at the request of Senator Ervin, sets out the possible theories on which the constitutionality of Title II could be sustained. See S. REP. NO. 90-1097, at 53.

At one point, relying on *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Legislative Reference Service memorandum maintained that if a constitutional ruling is based upon a "factual conclusion" by the Court, whether or not that conclusion is erroneous, "Congress may undertake to mold constitutional policy by itself making [a different] factual determination." S. REP. NO. 90-1097, at 63.

¹⁵⁶ *Senate Hearings on Separation of Powers*, *supra* note 146, at 26 (statement of Senator Ervin). However, Senator Ervin focused on a different "unsound factual assumption" than had the Legislative Research Service. According to Ervin:

The *Miranda* case is based upon a factual assumption, namely that law-enforcement officers in the United States are so bent on procuring convictions of people they arrest that they can't be trusted to interrogate them as they were for the first 166 years after the self-incrimination clause was put into the Constitution. . . .

. . . A decision of the Supreme Court, if it is based on a factual assumption which is incorrect, may be subject to Congress' power to legislate. The Supreme Court has no right to make constitutional determinations based upon unsound factual assumptions. I don't believe the great majority of law-enforcement officers in the United States are such disreputable people that they have to have the criminals protected against them.

S. REP. NO. 90-1097, at 24-25.

¹⁵⁷ Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 250-51 (1971); see also 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 6.5(e) at 518 (2d ed. 1999); Burt, *supra* note 71, at 125 ("It is not at all

Another response might be that § 3501 was not grounded on any congressional findings of fact. As Professor Robert Burt points out, "[a]s a general matter, it can be said that entire congressional debate on all sides of Title II was notably devoid of anything but the most speculative assertion of facts."¹⁵⁸

Still another response to the finding-of-fact argument in support of § 3501 is to ask what we mean by fact or factual. As Justice Frankfurter once reminded us, "'Issue of fact' is a coat of many colors," one that does not cover a conclusion "when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights."¹⁵⁹

If one defines factual determinations and factual assumptions loosely and broadly, the pre-*Miranda*, pre-*Escobedo* voluntariness test was also based on factual determinations and factual assumptions. As one close student of the pre-*Miranda* due process approach has recently noted, in those days the "engine" that "drove the results in the cases approving confessions . . . was constructed of assumptions about the nature of coercion and beliefs about the particular kinds of coercion that would influence most people to confess."¹⁶⁰

But were those assumptions and beliefs factual? Or were they normative judgments?

Writing for an 8-1 majority in *Miller v. Fenton*,¹⁶¹ Justice O'Connor pointed out that although the pre-*Miranda* confession cases framed the issue in a variety of ways, "usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,'" the Court's "longstanding position" has been that "'voluntariness' is a legal ques-

clear that the 'inherently coercive atmosphere' of custodial questioning was the only or the central underpinning for *Miranda*.").

The same view of *Miranda* appears in Justice Brennan's letter to Chief Justice Warren, commenting on a draft of the *Miranda* opinion. See Letter from Justice William J. Brennan to Chief Justice Earl Warren 9 (May 11, 1966) (on file with author) [hereinafter Brennan Letter]. Brennan points out that since "police interrogation, as presently administered, carries a substantial risk of testimonial compulsion," the Constitution requires both federal and state governments to "incorporate appropriate safeguarding procedures in their interrogation practices." *Id.* (emphasis added). Consider, too, Justice Powell's comments for a 7-2 majority in *Colorado v. Spring*, 479 U.S. 564, 565 (1987):

The *Miranda* warnings protect [the privilege against self-incrimination] by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of the constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him.

Id. at 574 (emphasis added).

¹⁵⁸ Burt, *supra* note 71, at 126.

¹⁵⁹ *Watts v. Indiana*, 338 U.S. 49, 51 (1949).

¹⁶⁰ Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2216 (1996).

¹⁶¹ 474 U.S. 104, 109 (1985).

tion meriting independent consideration in a federal habeas corpus proceeding."¹⁶² She continued:

[T]he Court's consistently held view [has been] that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.¹⁶³

Fifty-six years ago, in the famous case of *Ashcraft v. Tennessee*,¹⁶⁴ the Court held that thirty-six continuous hours of police questioning was "so inherently coercive" that no resulting confession could be voluntary, and that the situation in which the suspect was placed was "irreconcilable" with a voluntary confession.¹⁶⁵ Could Congress have overturned *Ashcraft* in federal or state cases by finding the factual assumption on which it was based unsound and then correcting it?

It seems silly to ask that question today, but it would not have seemed silly at the time. Justice Jackson, joined by Justices Roberts and Frankfurter, wrote a powerful dissent in *Ashcraft*, protesting that the Court "substitutes for determination on conflicting evidence the question whether this confession was actually produced by coercion, a presumption that it was, on a new doctrine that examination in custody of this duration is 'inherently coercive'" and that "it makes that presumption irrebuttable."¹⁶⁶ Jackson suggested that Mr. Ashcraft was one of those strong men who could "withstand for days pressure that would destroy the will of another in hours"¹⁶⁷ and he emphasized that "the evidence shows that . . . the confession when made was deliberate, free, and voluntary in the sense in which that term is used in criminal law."¹⁶⁸ "[T]he ultimate question," maintained Jackson, has been, and should be, whether, regardless of the circumstances, the particular suspect who confessed "was in possession of his own will and self-control at the time of confession."¹⁶⁹

¹⁶² *Id.* at 115.

¹⁶³ *Id.* at 116; see also YALE KAMISAR, *What Is an "Involuntary" Confession?*, in *POLICE INTERROGATION*, *supra* note 3, at 1, 14; Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73 (1966).

¹⁶⁴ 322 U.S. 143 (1944).

¹⁶⁵ *Id.* at 154.

¹⁶⁶ *Id.* at 156, 157 (Jackson, J., dissenting).

¹⁶⁷ *Id.* at 162 (Jackson, J., dissenting).

¹⁶⁸ *Id.* at 163-64 (Jackson, J., dissenting).

¹⁶⁹ *Id.* at 162 (Jackson, J., dissenting). Hancock points out that

Ashcraft was a milestone because it prefigured *Miranda's* recognition of the coercion inherent in all custodial interrogation. . . . In a prophetic dictum [a dissenting Justice Jackson] declared that 'even one hour' of interrogation would be inherently coercive, and so there could be no stopping point to the *Ashcraft* doctrine. However, more than twenty years elapsed before

"The answer to Justice Jackson's objection," observes Professor Joseph Grano, one of the nation's leading authorities on police interrogation and confessions, "lies in the component elements of the voluntariness inquiry."¹⁷⁰ "The first element," continues Grano, "requires a normative judgment at the constitutional level about the interrogation conduct of the police."¹⁷¹

But why can't the same thing be said of *Miranda*? The *Miranda* Court held that the privilege against self-incrimination applies not only to the proceedings in a courtroom or before a legislative committee, but to the "informal compulsion exerted by law-enforcement officers during in-custody questioning."¹⁷² Everything else in *Miranda* follows from this.

In-custody interrogation as practiced at the time—without advising the suspect of his rights and the consequences of waiving them—"is at odds" with the privilege.¹⁷³ When an individual is taken into custody and subjected to questioning, the privilege is "jeopardized"¹⁷⁴ and "procedural safeguards must be employed" to protect it.¹⁷⁵ "Even without employing brutality, the 'third degree' or the specific stratagems described [in the police manuals], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."¹⁷⁶

Unless the *Miranda* warnings or equally effective alternative safeguards are utilized, there can be no "assurance of real understanding and intelligent exercise of the privilege"¹⁷⁷ and no assurance that "the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."¹⁷⁸ Now that the privilege applies to in-custody interrogation, it is no longer acceptable for the police to question suspects as they did in the past—acting as if

this prophecy came to pass in the form of *Miranda*'s presumption that even a few moments of custodial interrogation are inherently coercive.

Hancock, *supra* note 160, at 2226 (footnotes omitted); see also KAMISAR, *supra* note 92, at 97-102.

¹⁷⁰ JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 104 (1993).

¹⁷¹ *Id.*; see also *id.* at 105 ("A more sensible reading of *Ashcraft*—and one that preserves the significance of voluntariness terminology—is that fundamentally inappropriate police conduct did in fact put pressure on (cause) the defendant to confess, something he did not want to do."). Cf. *Watts v. Indiana*, 338 U.S. 49, 51 (1949) (Frankfurter, J.) ("But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights.").

¹⁷² *Miranda v. Arizona*, 384 U.S. 436, 461, 467 (1966) (noting the "inherently compelling pressures which work to undermine the individual's will to resist").

¹⁷³ *Id.* at 457-58.

¹⁷⁴ *Id.* at 478.

¹⁷⁵ *Id.* at 478-79.

¹⁷⁶ *Id.* at 455.

¹⁷⁷ *Id.* at 469.

¹⁷⁸ *Id.*

they had a right to an answer and leading suspects to think that it will be so much the worse for them if they did not answer. Moreover, now that the privilege applies to in-custody interrogation, it would be anomalous not to make custodial suspects aware of their rights—as defendants in more formal settings are made aware of their rights—when “the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.”¹⁷⁹

One may disagree with the reasoning of the Court (as many have), but surely *Miranda* is based more on an interpretation of the self-incrimination clause and a judgment about how to strike the appropriate balance between the needs of law enforcement and the rights of custodial suspects¹⁸⁰ than on any “factual determination” or “factual assumption.” Surely Senator McClellan’s and Senator Ervin’s disagreement with the *Miranda* Court “is theoretical, not empirical.”¹⁸¹

It is fair to say—as the Supreme Court has said—that a “complex of values” underlies the due process—“totality of circumstances”—voluntariness test.¹⁸² I do not see why the same may not be said for the underpinning of the *Miranda* doctrine. As a keen student of *Miranda* has recently observed: “One cannot read the majority opinion in *Miranda* to describe anything other than a normative vision about the constitutional limits on a custodial interrogation.”¹⁸³

¹⁷⁹ *Id.* at 461. *Cf. Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944). The Court in *Ashcraft* stated:

It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours. . . . Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influence of a public trial in an open court room.

Id.

¹⁸⁰ *Cf. Moran v. Burbine*, 475 U.S. 412, 426-27, 433 n.4 (1986) (O'Connor, J.) (“As any reading of *Miranda* reveals, the decision, rather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, embodies a carefully crafted balance designed to fully protect both the defendant’s and society’s interests.”).

¹⁸¹ *Cf. Deborah Jones Merritt, Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1289 (1999) (“The dispute lies in the realm of theory, not fact.”).

¹⁸² *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 224-225 (1973) (noting that “‘voluntariness’ has reflected an accommodation of the complex of values implicated in police questioning of a suspect”).

¹⁸³ Weisselberg, *supra* note 144, at 123. Weisselberg adds that:

The Court included in *Miranda* the long, didactic passages about the history of the Fifth Amendment, about interrogation techniques, about evolving police practices, about the impact of questioning upon minorities, and about the role of counsel not only to support the Court’s legal conclusions, but also to persuade the police and the public.

The line between a factual assumption and a value judgment is not always easy to discern. For example, at first glance the issues of when human life begins and what is a person may look like questions of fact. As Professor Laurence Tribe has pointed out, however, "[s]uch questions [call] at bottom for normative judgments no less profound than those involved in defining 'liberty' or 'equality.'"¹⁸⁴

If Congress could overturn a constitutional ruling by legislation simply by removing or correcting what it calls the unsound factual determination or factual assumption on which it claims the constitutional ruling is based, then Congress would possess "the power to determine what constitutes a constitutional violation"¹⁸⁵ and "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."¹⁸⁶

In *Furman v. Georgia*,¹⁸⁷ a 5-4 majority, per curiam, held that the imposition and carrying out of the death penalty under statutes before the Court, as they were then administered, constituted "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments. As a result, the laws of thirty-nine states and various federal statutory provisions were struck down. Each of the justices wrote a separate concurring or dissenting opinion explaining his reasons for invalidating or upholding the death penalty.¹⁸⁸ But the pivotal opinions were written by Justices Stewart and White.

Id.

¹⁸⁴ WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS 1489 (8th ed. 1996) (quoting a statement made by Laurence Tribe at a Senate hearing on a "Human Life" Bill); see also Irving A. Gordon, *The Nature and Use of Congressional Power under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U. L. REV. 656, 691 (1977). Professor Gordon maintains the following:

Congress has power to overturn the empirical findings of the Court; but it can do so only as long as it does not infringe on the normative component of the judicial decision. Were Congress to make an empirical "finding" that an abortion procedure that was difficult or relatively unavailable was safer, thereby banning the generally available one, its legislation could not stand. In that case, its normative finding would undermine the normative principle of the woman's autonomy over her body.

Professors Gordon and Tribe are both discussing generally the power of Congress under Section Five of the Fourteenth Amendment, and § 3501 deals only with *Miranda* in federal criminal prosecutions, but their comments seem equally applicable to attempts to overturn or to modify Supreme Court rulings in the federal courts. See U.S. CONST. amend. XIV, § 5.

¹⁸⁵ Cf. *Boerne v. Flores*, 521 U.S. 507, 519 (1999) ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

¹⁸⁶ *Id.* at 529.

¹⁸⁷ 408 U.S. 238 (1972) (per curiam).

¹⁸⁸ *Furman* has been called "a badly orchestrated opera, with nine characters taking turns to offer their own arias." Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315.

Justice Stewart thought the death sentences before the Court were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹⁸⁹ Of all the criminal defendants convicted of murder in recent years, "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."¹⁹⁰ He concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit the unique penalty to be so wantonly and so freakishly imposed."¹⁹¹

According to Justice White, "as the statutes before us are now administered, the [death] penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."¹⁹² Moreover, "based on 10 years of almost daily exposure to the facts and circumstances" of many cases involving crimes for which death was the authorized penalty, Justice White concluded that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."¹⁹³

Four years later, the Court upheld a number of post-*Furman* capital-sentencing procedures,¹⁹⁴ concluding that these newly-drafted statutes satisfied "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner."¹⁹⁵

But what if the states and the federal government had not drafted new statutes designed to meet the concerns expressed in *Furman*? What if the states and the federal government had stood pat? If Congress can overturn *Miranda* legislatively by correcting the unsound "factual assumptions" on which it is based, why could Congress not treat *Furman* the same way?

It would have been no great feat to invite "representatives of what might be called the 'law enforcement lobby'"¹⁹⁶ to present anecdotal evidence or to cite a prosecutor's survey (as was done in the wake of *Miranda*) undercutting the "factual underpinnings" of Stewart's and White's pivotal *Furman* opinions. We have a pretty good idea of how such testimony would have run. For a year after *Furman* the President of the National District Attorneys Association, Texas prosecutor Carol Vance, sought to assure the public (as he would have sought to assure

189 *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

190 *Id.* at 309-10 (Stewart, J., concurring).

191 *Id.* at 310 (Stewart, J., concurring).

192 *Id.* at 313 (White, J., concurring).

193 *Id.* (White, J., concurring)

194 See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

195 *Gregg*, 428 U.S. at 195 (plurality opinion).

196 See *supra* text accompanying note 90.

a Senate subcommittee calling upon him to testify on the subject) that those sentenced to death do *not* constitute "a capriciously selected random handful," the death penalty is *not* "wantonly" and "freakishly" imposed, and there *is* a "meaningful basis" for distinguishing the few murder cases in which the death penalty is imposed from the many murder cases in which it is not:

Actually there is a fairly universal consensus on which cases should receive the harshest penalties. . . . It is only in the bizarre murder, the killing for hire or during another serious crime, and a few other isolated instances that the people of this country want to see the death penalty applied. And these crimes are a small percentage of the overall murders. The prosecutors of Texas (as well as any judge or defense attorney) can listen to a set of facts and tell you whether it is a death penalty case. . . .

. . . .

The truth of the matter is that there *should* be very few death penalty sentences. Only a very few cases warrant this extreme measure. It takes two essential ingredients . . . : (1) overwhelming proof of the defendant's guilt and (2) an extremely aggravated fact situation. What is so surprising is Justice White's and Justice Stewart's conclusion that there is something highly improper in so few people receiving the death penalty.¹⁹⁷

Not all post-*Furman* capital-sentencing procedures passed constitutional muster. The same day it upheld new statutes in *Gregg* and companion cases, the Court invalidated post-*Furman* mandatory death sentence statutes.¹⁹⁸

A "separate deficiency" of North Carolina's mandatory death statute was "its failure to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences."¹⁹⁹ How could a jury exercise "unbridled discretion" when it was applying a mandatory death sentence? In light of the historic jury resistance to mandatory death penalties, the plurality thought it "only reasonable to assume"²⁰⁰ that many juries—despite their oaths—would use discretion in imposing the death penalty and the mandatory death penalty statute "provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die."²⁰¹

¹⁹⁷ Carol S. Vance, *The Death Penalty After Furman*, 48 NOTRE DAME L. REV. 850, 858 (1973).

¹⁹⁸ See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

¹⁹⁹ *Woodson*, 428 U.S. at 302.

²⁰⁰ *Id.* at 303.

²⁰¹ *Id.*

If Congress can overrule *Miranda* by simple legislation because it is based on an unsound factual assumption, then it can overturn the mandatory death penalty cases by the same route. I venture to say it would not be difficult for Congress to find witnesses who would testify that juries do not (or no longer) resist mandatory death penalties in murder cases and do not (or no longer) violate their oaths in mandatory death penalty cases by exercising discretion in deciding which murderers "shall live and which shall die."

The mandatory death sentence cases did not mark the only time the Court concluded that the jury could not be expected to follow the court's instructions. One need only recall a famous confession case, *Jackson v. Denno*.²⁰²

In accordance with the then-prevailing New York practice, when a question was raised about the voluntariness of the defendant's confession, the trial court submitted that issue, along with the other issues in the case, to the jury. The court told the jury that "if it found the confession involuntary, it was to disregard it entirely, and determine guilt or innocence solely from the other evidence in the case; alternatively, if it found the confession voluntary, it was to determine its truth or reliability and afford it weight accordingly."²⁰³

The Court, per Justice White, concluded that the New York procedure utilized in the case "did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack."²⁰⁴

The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe the confession and believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession.

In those cases where without the confession the evidence is insufficient, the defendant should not be convicted if the jury believes the confession but finds it to be involuntary. The jury however may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence con-

²⁰² 378 U.S. 368 (1964).

²⁰³ *Id.* at 374-75.

²⁰⁴ *Id.* at 377.

cerning the circumstances of the confession becomes difficult and the implicit findings become suspect.²⁰⁵

* * *

[The alternative assumption]—that the jury found the confession involuntary and disregarded it—is equally unacceptable. Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession?

It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.²⁰⁶

Jackson v. Denno is filled with what might loosely be called factual assumptions. (I would call them the judgments and insights of the Justices based on decades of experience as lawyers and judges and decades of studying and thinking about the legal system.) If Congress could overrule *Miranda* by simple legislation because the case is based on unsound "factual assumptions," then surely it could overrule *Jackson v. Denno* as well.²⁰⁷

²⁰⁵ *Id.* at 381-82 (citation omitted).

²⁰⁶ *Id.* at 388-89.

²⁰⁷ *Cf. Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* holds that where the confession of one codefendant contains references to a second codefendant and the first codefendant declines to take the stand in his own defense, the use of the confession in a joint trial violates the second codefendant's Sixth Amendment right of confrontation *despite* instructions to the jury that the confession constitutes admissible evidence only against the confessor. *See id.* at 135-36 (Brennan, J.). The *Bruton* Court explained that

as was recognized in *Jackson v. Denno*, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. (Brennan, J.).

But the difference between whether a jury will not or cannot follow instructions, and when it will and can do so, may certainly be called factual determinations or factual assumptions. For a discussion of *Bruton* and its progeny, see LAFAYE, ISRAEL, & KING, *supra* note 157, § 17.2(b).

And what of the Court's statement in *Brown v. Board of Education* that "[s]eparate educational facilities are inherently unequal"?²⁰⁸ The *Brown* Court also told us that separating children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."²⁰⁹

If statements in *Miranda* that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals,"²¹⁰ the interrogation atmosphere "carries its own badge of intimidation,"²¹¹ "[t]he current practice of incommunicado interrogation is at odds with" the privilege against self-incrimination,²¹² and "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice"²¹³ are factual determinations or assumptions that can be reexamined and corrected by Congress in the form of legislation abolishing the ruling, then the same may be said about the *Brown* case.

It is worth recalling how Professor Alexander Bickel responded when Senator Ervin suggested that since *Miranda* and *Wade* are "based upon false or unsound factual assumptions," "the Congress can pass a statute based upon its own findings and do away with the rules"²¹⁴:

[I]t is not quite enough to refer to the factual bases of Supreme Court decisions and be willing to let Congress override those, because the realm of fact probably covers most of what there is. . . .

Certainly [*Brown*] is based on a factual finding, both as to the nature of education, what it does, and more at large as to the nature of society and what State-imposed racial destinations have to do with it. These are factual matters.

Similarly in *Miranda* there are facts more at large to which the Supreme Court could retreat. The answer could be no, we don't think every policeman tries to administer the third degree to every prisoner. We believe that in the station house situation, there is a natural unintended effect of overbearing the prisoner. That is a factual premise, but I suppose it is too near to the core of the consti-

²⁰⁸ *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

²⁰⁹ *Id.* at 494. I agree with Professor Merritt, *see* Merritt, *supra* note 181, at 1293, that the statements from *Brown* quoted in the text are "social conclusion[s]" reached after "a complex intellectual journey," but they may also loosely be called "factual premises" or "factual assumptions."

²¹⁰ *Miranda v. Arizona*, 384 U.S. 436, 455 (1966).

²¹¹ *Id.* at 457.

²¹² *Id.* at 457-58.

²¹³ *Id.* at 458.

²¹⁴ *Senate Hearings on Separation of Powers*, *supra* note 146, at 26 (statement of Professor Bickel). These hearings, chaired by Senator Ervin, should be distinguished from those chaired by Senator McClellan. The Ervin hearings touched upon, but did not concentrate on, § 3501.

tutional proposition that if you allow that to be overruled, what is left of the function of judicial review?²¹⁵

B. Arguments Made in the Post-Warren Court Era

In June of 1969, the Department of Justice (DOJ), now headed by Attorney General John Mitchell, made a valiant effort to defend the constitutionality of § 3501. With Mitchell's authorization, a memorandum "consistent with President Nixon's frequent criticism of Warren Court decisions on interrogation and related aspects of police procedure"²¹⁶ was sent to all United States Attorneys. It explained why "the failure to give the warnings required by *Miranda* will not necessarily require exclusion of a resulting confession."²¹⁷

The DOJ memorandum emphasized that the *Miranda* Court required "some 'system' to safeguard against inherently compulsive circumstances," not any "particular system."²¹⁸ This is true, but § 3501 does not establish any system to protect against inherent compulsion—other than the pre-*Escobedo*, pre-*Miranda* voluntariness test which the Court found inadequate.

"Since these specific warnings are not themselves constitutional absolutes," continued the DOJ, "the determination by Congress—that their absence in a case should not entail an inflexible imposition of the exclusionary rule—is within the power of Congress."²¹⁹ To be sure, the *Miranda* warnings are not "constitutional absolutes" in the sense that *another* set of procedural safeguards might constitute a suitable substitute, but § 3501 does not provide another set of safeguards—it only reinstates the voluntariness test. *Why*, then, is § 3501 "within the power of Congress"?

The DOJ memorandum goes on to say that § 3501 "clearly recognizes that a statement . . . must be made with awareness of the individual's Fifth Amendment rights. . . ."²²⁰ But § 3501 does no such thing. It directs the district judge to "take into consideration," along with "all other circumstances surrounding the giving of the confession,"

²¹⁵ *Id.* at 27.

²¹⁶ STEPHENS, *supra* note 40, at 164.

²¹⁷ Memorandum from the Department of Justice to the United States Attorneys (June 11, 1969), 5 Crim. L. Rep. (BNA) 2350 (1969) [hereinafter DOJ Memorandum].

I am indebted to Professor Lawrence Herman for first calling this memorandum to my attention. As Professor Herman points out, at the time the memorandum appeared future Justice William Rehnquist headed the Office of Legal Counsel. See Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 738-39 n. 44 (1987). I know of no evidence that the memorandum was drafted in the Office of Legal Counsel, but it would not be surprising if the Office had at least been consulted when the memorandum was prepared.

²¹⁸ DOJ Memorandum, *supra* note 217, at 2351.

²¹⁹ *Id.* at 2351-52.

²²⁰ *Id.* at 2352.

whether a defendant was advised of her right to remain silent and her right to the assistance of counsel.²²¹ But it allows the trial judge to admit the confession into evidence even though the suspect neither knew nor was advised of her rights.²²² For "the presence or absence" of any of the factors the trial judge is supposed to take into consideration "need not be conclusive on the issue of voluntariness of the confession."²²³

Moreover, § 3501 does nothing to assure that an individual giving a statement is made aware of her Fifth Amendment rights. For the statute is directed at the trial judge who is to determine the admissibility of a confession, not at the police interrogator. It does not require the police to tell a custodial suspect *anything*.

Finally, the DOJ memorandum states that "Congress has reasonably directed" that a confession be excluded "only where the constitutional privilege itself has been violated, but not where a protective safeguard system suggested by the Court has been violated in a particular case without affecting the privilege itself."²²⁴ This language drives a wedge between the *Miranda* warnings and the privilege—as does similar language in subsequent Supreme Court opinions²²⁵—but it is quite misleading.

The DOJ itself recognizes, earlier in its memorandum, that although *Miranda* did not find "a *particular* system" of procedural safeguards "necessary" to protect the privilege, it was "some 'system' to safeguard against inherently compulsive circumstances which the Court found necessary under the Constitution."²²⁶ When *the only* system to safeguard against inherently compulsive circumstances is violated—and § 3501 does not provide any other—the privilege against self-incrimination *is* affected.

As anyone familiar with the legislative history of Title II (discussed at considerable length earlier in this Article) is likely to conclude, there is a fictitious air about the DOJ memorandum's benign reading of § 3501. There is much talk in the memorandum about meeting "the requirements of the privilege" without complying with *Miranda*,²²⁷ "whether a breach of a protective measure result[s] in an actual breach of the privilege itself,"²²⁸ and how § 3501 recognizes

²²¹ 18 U.S.C. § 3501(b) (1994).

²²² See *id.* ("The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.").

²²³ *Id.*; see also *supra* note 2 (reprinting the text of § 3501).

²²⁴ DOJ Memorandum, *supra* note 217, at 2352.

²²⁵ See *infra* text accompanying notes 278-98.

²²⁶ DOJ Memorandum, *supra* note 217, at 2351.

²²⁷ *Id.*

²²⁸ *Id.* at 2352.

that a statement "must be made with awareness of the individual's Fifth Amendment rights."²²⁹ I doubt that anyone who had only read the DOJ memorandum, not the text of § 3501 as well, would have any idea that § 3501 never mentions the privilege or the Fifth Amendment or the self-incrimination clause.²³⁰

The reasons for this silence are not hard to apprehend. The proponents of § 3501 were not trying to satisfy the requirements of the privilege. They were not interested in the privilege. They did not believe the privilege should have any bearing on the admissibility of confessions.²³¹

As the report of the Senate Judiciary Committee makes plain, the proponents of § 3501 maintained that the "traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored."²³² As they viewed § 3501, it "reflect[ed] the historical rule governing admissibility of a confession,"²³³ a rule whose "balancing of the rights of society and the rights of the individual" had "served us well over the years."²³⁴ The instructions to the trial judge to "take into consideration" the "circumstances surrounding the giving of the confession" (including whether the suspect knew or had been advised of his rights)²³⁵ were not designed to accommodate *Miranda*; these circumstances were simply those the trial

²²⁹ *Id.*

²³⁰ See 18 U.S.C. § 3501 (1994); see also *supra* note 2 (reprint the text of § 3501).

²³¹ Consider, for example, the following exchange between Senator Ervin and Judge Lumbard:

SEN. ERVIN: [T]aking the language of the self-incrimination clause, it would seem to have no application whatever to a voluntary confession; is that not true?

JUDGE LUMBARD: I think I would agree with that. That is my own personal view.

* * *

SEN. ERVIN: [U]nder the language of the [F]ifth [A]mendment, it would seem that the plain English words there have a clear meaning and that they could have no application to a voluntary statement made by a person in the custody of an officer, because he is not a witness in any legal sense.

JUDGE LUMBARD: This is exactly the arguments that States made in the *Miranda* case.

* * *

SEN. ERVIN: In summary, don't you agree with me that just from the standpoint of assigning to the English language the true meaning of these words, that it is quite an intellectual feat to say that the self-incrimination clause could have any application to a voluntary confession?

JUDGE LUMBARD: I agree with your point of view, Senator, and I said so in some opinions which I wrote for our court prior to the *Miranda* case.

Senate Hearings, supra note 20, at 189-90 (statement of Senator Ervin and Judge Lumbard).

²³² S. REP. NO. 90-1097, at 37, 47, 51, 53 (1968).

²³³ *Id.* at 47.

²³⁴ *Id.* at 51.

²³⁵ 18 U.S.C. § 3501(b).

court had previously taken, and was to continue to take, into account "in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination."²³⁶

As Senator McClellan told one witness, passage of the bill he introduced "would be tantamount to restoring the longstanding, traditional procedures."²³⁷ As he told another witness, if his bill were enacted into law he hoped that the Supreme Court would change its mind and uphold the law, thereby "restor[ing] the law regarding confessions to what it has been throughout the history of the Nation."²³⁸ The "corrective legislation" he was proposing, McClellan told the Senate, "would bring about a complete restoration of the sound rule which allows the admissibility of a confession of an accused if it is voluntarily made."²³⁹ At another point he asked how a "civilized society" should determine the admissibility of a confession and quickly supplied the answer:

If [the trial judge] concludes [the confession] was the voluntary act of the defendant, he should admit it and then permit the jury to hear all the evidence as to the circumstances of the giving of the confession or statement, with instructions that it be given such weight as the jury may feel it is entitled to receive. In short, the totality of the circumstances is the true and should be the only test for the court in determining voluntariness and the admissibility of a confession.²⁴⁰

²³⁶ S. REP. NO. 90-1097, *supra* note 20, at 51; *see also infra* text accompanying notes 266-74.

²³⁷ *Senate Hearings*, *supra* note 20, at 1174 (statement of Senator McClellan).

²³⁸ *Id.* at 194 (statement of Senator McClellan).

²³⁹ 114 CONG. REC. 11,207 (1968).

²⁴⁰ 114 CONG. REC. 13,848. However, just before the Senate was to vote on a motion to strike § 3501 (a motion that failed), Senator McClellan told the president of the Senate that "this division has to do with the *Miranda* decision and says that the *Miranda* case shall be taken into consideration by the trial judge in determining whether a statement is voluntary and if he determines that the confession is voluntary, he then submits it to the jury. . . ." 114 CONG. REC. 14,171-72. The judge, continued McClellan, "must find himself, out of the presence of the jury, that [the confession] was voluntarily made, without coercion and without intimidation." *Id.* The following exchange then occurred:

SEN. LAUSCHE: Mr. President, does the Senator's statement embody what has been the law for more than 170 years?

SEN. MCCLELLAN: The Senator is correct.

SEN. LAUSCHE: I refer to the fact that the judge hears the testimony, determines whether the confession is voluntary and in conformity with the *Miranda* pronouncements, and then also submits it to the jury to likewise make a determination as to whether it is voluntary?

SEN. MCCLELLAN: The Senator is correct.

SEN. LAUSCHE: And that began in 1787?

SEN. MCCLELLAN: The Senator is correct.

Id. at 14,172.

This exchange is quite confusing. Obviously, trial judges determining the voluntariness of a confession had not taken into account "for more than 170 years" or since 1787 whether the confession was obtained "in conformity with the *Miranda* pronouncements."

As did the Department of Justice in 1969, the Fourth Circuit panel that decided *Dickerson* would have us believe that there is a certain rapport between § 3501 and *Miranda*. Thus, perhaps responding to the Justice Department's arguments that "Congress cannot be deemed to have taken advantage of" the Court's invitation to develop alternatives to *Miranda* because § 3501 "simply relegated warnings back to their pre-*Miranda* status,"²⁴¹ the Fourth Circuit considered it "important to note" that—

Congress did not completely abandon the central holding of *Miranda*, i.e., the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifically lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given.²⁴²

First of all, § 3501 has nothing to say about one of the *Miranda* warnings: whether the suspect was told that if he could not afford a lawyer but wanted one, a lawyer would be provided for him prior to any questioning.²⁴³ More important, § 3501 does not list any warnings or require any warnings; the section only directs the trial judge to consider certain factors when determining the voluntariness of a confession. Still more important, although to somebody who has not read or re-read the pre-*Miranda* confession cases recently, the factors listed in § 3501 do look like something resembling the *Miranda* warnings, they are not. They are not even emanations from *Miranda*. They are simply some of the many components of the pre-*Miranda* voluntariness test.

Id. Moreover, if § 3501 did require the trial judge to do that, it would defeat the frequently stated purpose of the provision—to overturn *Miranda* or, at least, to get the Court to reconsider the decision.

In any event, this is the only statement by Senator McClellan I came across suggesting he believed that under § 3501 the trial judge determining the admissibility of a confession is supposed to take into consideration the *Miranda* case—and it is inconsistent with many other statements McClellan made about the meaning and purpose of § 3501. Senator Lausche's questions to Senator McClellan are even more puzzling. Why would he support a bill requiring the trial judge to determine whether the confession is obtained "in conformity" with *Miranda* when earlier the same day he charged that the *Miranda* Court had "amended the Constitution in nonconformity with the procedure set forth in that sacred document specifying how amendments shall be made"—had "usurped the powers reserved to the people, the Congress, and the separate State legislatures." *Id.* at 14,139. Moreover, Senator Lausche had testified at the Senate subcommittee hearings that "[f]or 177 years . . . no one ever thought of this *Miranda* principle" and "if law and order is to be maintained the Congress should take action to nullify that decision." *Senate Hearings*, *supra* note 20, at 141 (statement of Senator Lausche).

²⁴¹ Supplemental Brief for the United States at 13, *United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997) (No. 96-4876).

²⁴² *United States v. Dickerson*, 166 F.3d 667, 687 (4th Cir.), *cert. granted*, 120 S. Ct. 275 (1999).

²⁴³ See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

Section 3501(b) does list numerous factors that the trial judge "shall take into consideration," including whether or not the suspect has been advised of his rights, but goes on to say that "the presence or absence of any of [these] factors . . . need not be conclusive on the issue of the voluntariness of the confession."²⁴⁴ The operative words are "take into consideration" and "factors." This statute adds nothing to the pre-*Miranda* voluntariness test. As Judge Henry Friendly noted a year before *Miranda* was handed down, "lack of counsel and of advice that a suspect might wish to consult counsel before making a statement are *always* factors to be weighed in determining the voluntariness of a confession—a concept that has broadened far beyond physical coercion."²⁴⁵

Judge Friendly was a leading critic of the Warren Court's "revolution" in American criminal procedure. The most forceful critic of *Escobedo* and *Miranda* on the Court was Justice Byron White. He, no less than Judge Friendly, was well aware of the nature and scope of the pre-*Miranda* voluntariness test. Defending the test against growing attack, dissenting Justice White observed in *Escobedo*:

The Court may be concerned with . . . the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. But this worry hardly calls for the broadside the Court has now fired. The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. . . . When the accused has not been informed of his rights at all the Court characteristically

²⁴⁴ 18 U.S.C. § 3501(b); see also *supra* note 2 (reprinting the text of § 3501).

²⁴⁵ HENRY J. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, in BENCHMARKS, *supra* note 1, at 235, 249 (emphasis added). This is probably an overstatement. Lack of counsel and advice about counsel were probably not factors in the 1930s, but emerged as significant factors as the voluntariness test evolved and became more demanding. Thus, in the last of the pre-*Escobedo*, pre-*Miranda* confession cases, *Haynes v. Washington*, 373 U.S. 503 (1963), a 5-4 majority, through Justice Goldberg, observed:

The jury was instructed, in effect, not to consider as relevant on the issue of voluntariness of the confession the fact that a defendant is not reminded that he is under arrest, that he may remain silent, that he is not cautioned that he may remain silent, that he is not warned that his answers may be used against him, or that he is not advised that he is entitled to counsel. Whatever independent consequences these factors may otherwise have, they are unquestionably attendant circumstances which the accused is entitled to have appropriately considered in determining voluntariness and admissibility of his confession.

Id. at 516-17.

What Judge Friendly may have meant was that after *Haynes*, it was clear that whether a suspect had counsel or was advised of his right to consult with counsel (or of his right to remain silent) were *always going to be* significant factors in deciding whether a confession was voluntary.

and properly looks very closely at the surrounding circumstances. I would continue to do so.²⁴⁶

Two years later, when his fears that a majority of the Court was bent on establishing a new test for the admissibility of confessions had proven well-founded, Justice White observed:

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. The [voluntariness] test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer". . . . The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry.²⁴⁷

The author of the *Miranda* opinion was also aware of the nature and scope of the voluntariness test. One week after *Miranda*, in the course of declining to apply *Escobedo* or *Miranda* retroactively, but only to trials begun after these decisions were announced, Chief Justice Warren observed for a 7-2 majority:

[O]ur case law on coerced confessions is available for persons whose trials have already been completed Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years. That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance.²⁴⁸

The very same day, applying the voluntariness test to a case tried before *Escobedo* or *Miranda*, the Court, again speaking through Chief Justice Warren, made plain that the failure to advise a suspect of his rights had a significant impact on the voluntariness of his confession. In granting habeas corpus relief to a prisoner who had not been advised of his rights until after he had confessed orally on the sixteenth day of his detention, the Court, per Chief Justice Warren, noted that "[h]ad the trial in this case before us come after our decision in *Miranda*, we would reverse summarily."²⁴⁹ But that was not the end of the story:

²⁴⁶ *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964) (White, J., dissenting) (citations omitted).

²⁴⁷ *Miranda*, 384 U.S. at 534 (White, J., dissenting) (citations omitted).

²⁴⁸ *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (citations omitted); see also *id.* at 731 ("[P]ast decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions.") (citations omitted).

²⁴⁹ *Davis v. North Carolina*, 384 U.S. 737, 739 (1966).

The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a *significant factor* in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness. Thus, the fact that Davis was never effectively advised of his rights *gives added weight* to the other circumstances [which] made his confession involuntary.²⁵⁰

In its amicus brief partially supporting the defendant's petition for certiorari in the *Dickerson* case, the Washington Legal Foundation (WLF) notes that § 3501 requires the trial judge "to consider, not as the sole factor but as a prominent one, whether the warnings were given."²⁵¹ However, as the pre-*Miranda* voluntariness test became "increasingly meticulous through the years,"²⁵² the failure to warn a suspect of his right to remain silent and his right to counsel had become increasingly prominent factors in the application of the voluntariness test.²⁵³ As the author of the most comprehensive study of the pre-*Miranda* due process-voluntariness test has observed:

It is not surprising to find that the last strain of pre-*Miranda* Due Process analysis focused upon such persistent concerns as the denial of access to counsel, and the failure to give warnings about the privilege. The Court had come to regard these police actions as coercive per se; the Court also had come to view these actions as predictable features of custodial interrogation.²⁵⁴

Perhaps anticipating the argument that Congress can no more pass laws that "restrict, abrogate, or dilute" constitutional rights in the federal courts than it can when it exercises its powers under Section Five of the Fourteenth Amendment to "enforce" the provisions of that Amendment,²⁵⁵ the Washington Legal Foundation makes the bold claim that § 3501—

²⁵⁰ *Id.* at 740-41 (citations omitted) (emphasis added).

²⁵¹ Brief for Amicus Curiae Washington Legal Foundation in Partial Support of Petitioner on Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit at 11, 120 S. Ct. 275 (1999) (No. 99-5823) [hereinafter Washington Legal Foundation Brief].

²⁵² *Johnson*, 384 U.S. at 731; see also *Miranda*, 384 U.S. at 508 (Harlan, J., dissenting) ("[S]ynopsis of the uses [applying the due process—voluntariness test] would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility.").

²⁵³ See *supra* text accompanying notes 249-50.

²⁵⁴ *Hancock*, *supra* note 160, at 2235-36.

²⁵⁵ U.S. CONST. amend. XIV, § 5. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court, through Justice Brennan, "emphasize[d] that Congress' power under § 5 is limited

does not simply restore the legal status quo ante but goes significantly beyond pre-*Miranda* voluntariness law. . . . The statute directs the district court to consider whether the "defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of the confession." [§ 3501(b)(2)]. This requirement extends further than existing *Miranda* and Fifth Amendment case law, which makes clear that such inquiry by the trial court is *not* routinely required in order to assess the voluntariness of a suspect's confession.²⁵⁶

Many commentators (and I am afraid I am one of them) have talked about *Miranda* "discarding" or "supplanting" the voluntariness test. This is not completely accurate. The *Miranda* court did find the voluntariness test wanting, but it did not replace it in all settings and under all circumstances. *Miranda* added another test. The voluntariness test is still there.

If a custodial suspect effectively waives his *Miranda* rights and agrees to talk to the police, but insists he is completely innocent, the police do not have a free hand. They cannot subject the suspect to many hours of relay interrogation,²⁵⁷ nor strip off his clothes and keep him naked for several hours,²⁵⁸ nor pretend to bring in the suspect's ailing wife for questioning unless he agrees to cooperate.²⁵⁹ Furthermore, if a suspect confesses to the police under circumstances in which the officer is not required to give the *Miranda* warnings, e.g., the individual is not in custody, the suspect may still contend that the confession was obtained involuntarily. In other words, just as the police may satisfy the voluntariness test, but violate *Miranda*, so may they meet *Miranda*'s requirements or have no need to comply with *Miranda* yet fail the voluntariness test.

The question, then, is not whether § 3501 goes beyond *Miranda* in some respects. Rather it is whether, in protecting the rights of custodial suspects, the statute goes beyond the voluntariness test. It is hard to see how § 3501(b)(2) does—how the specification of any particular surrounding circumstance "goes significantly beyond pre-*Miranda* voluntariness law," as the Washington Legal Foundation claims²⁶⁰—when, in applying the voluntariness test, "the Court has assessed the totality of *all* the surrounding circumstances."²⁶¹

to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Id.* at 651 n.10.

²⁵⁶ Washington Legal Foundation Brief, *supra* note 251, at 11-12 (citation omitted).

²⁵⁷ See *supra* text accompanying notes 164-65.

²⁵⁸ See *Malinski v. New York*, 324 U.S. 401 (1945).

²⁵⁹ See *Rogers v. Richmond*, 365 U.S. 534 (1961).

²⁶⁰ See Washington Legal Foundation Brief, *supra* note 251, at 11-12; see also *supra* text accompanying note 256.

²⁶¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (emphasis added). I do not find persuasive the argument that specifically enumerating one or more surrounding cir-

To be sure, in noting the oppressive or offensive circumstances surrounding the confession the Court seldom pointed to the failure of the defendant to know the nature of the offense with which he was charged or of which he was suspected.²⁶² The Court was too busy calling attention to other "surrounding circumstances" which it found more disturbing—threats of violence, physical deprivation such as lack of sleep or food, persistent and prolonged questioning, the refusal of requests to communicate with lawyers or relatives, the failure to advise the suspect of the right to remain silent or the right to consult with counsel, and the violation of state laws requiring that arrested persons be promptly brought before a magistrate.²⁶³

As we have seen,²⁶⁴ the WLF relies on *Colorado v. Spring* for the proposition that a suspect's knowledge of the offense with which he is charged had not been one of the circumstances to be considered in determining the voluntariness of a confession. However, I think the WLF is confusing *Miranda* with the voluntariness test. On the page of the opinion the WLF cites, the *Spring* Court is only discussing *Miranda*: The failure of law enforcement officers to inform a custodial subject of the subject matter of the interrogation is not a violation of anything required by *Miranda* and "could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature"; thus it "could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner."²⁶⁵

cumstances in a statute gives these circumstances more significance or more weight. Does it then follow that the failure to single out other circumstances make them less significant or entitle them to less weight? Why is violence or the threat of it; or physical deprivation, such as the lack of sleep; or persistent and prolonged questioning not specifically mentioned in § 3501? Under the statute, are these factors now less significant or entitled to less weight than the failure to notify the suspect of the charge against him?

²⁶² But see *Harris v. South Carolina*, 338 U.S. 68, 69 (1949) (holding that the defendant's confession was involuntarily obtained and noting that "[n]o warrant was read to him and he was not informed of the charge against him"). The Court also pointed out that the defendant first learned that he was suspected of murdering a certain person three days after he was taken into custody. See *id.*; see also *Gallegos v. Nebraska*, 342 U.S. 55, 65 (1951) (plurality opinion).

²⁶³ See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Culombe v. Connecticut*, 367 U.S. 568, 601-02, 629-31 (1961); *Reck v. Pate*, 367 U.S. 433, 442-44 (1961); *Turner v. Pennsylvania*, 338 U.S. 62, 64 (1948).

²⁶⁴ See *supra* text accompanying note 256.

²⁶⁵ *Colorado v. Springs*, 479 U.S. 564, 577 (1987). However, at another page, *id.* at 574, one not cited by the WLF, the *Spring* Court observes that the failure to inform a suspect of the subject matter of the interrogation "does not relate to any of the traditional indicia of coercion," and then quotes a short summary by Justice Frankfurter of the kinds of circumstances that go into an assessment of voluntariness, a summary that omits the failure to inform a suspect of the crime for which he is charged and a number of other factors. *Id.* As pointed out earlier, because it ranks well below many other circumstances surrounding the obtaining of a confession—both in terms of coercion and offensiveness—the failure to inform a suspect of the subject matter of the interrogation is not likely to make any short list of factors to be taken into account. See *supra* text accompanying note 261.

In an article he wrote thirty years ago, Professor Burt provides some support for the WLF's position:

[Section 3501] does not wholly sweep aside *Miranda* and its immediate ancestor *Escobedo v. Illinois*, to restore pristine the prior federal law. In particular, [§ 3501] explicitly recognizes that "prior to questioning" there is "a right to the assistance of counsel," a right that was not clearly established until *Escobedo*.²⁶⁶

I venture to say that Professor Burt is assigning too much significance to the phrase "a right to the assistance of counsel." By listing whether or not a suspect was advised of "his right to the assistance of counsel" as a relevant factor—but not a determinative one—§ 3501 is not recognizing or establishing a right to counsel in the *Escobedo* sense.

In *Haynes v. Washington*,²⁶⁷ the last of the pre-*Escobedo*, pre-*Miranda* confession cases, the Court pointed out that nothing in the record indicated that prior to signing the confession "Haynes was advised by the authorities of his right to remain silent . . . or told of his rights respecting consultation with a lawyer."²⁶⁸ But this was a year before *Escobedo* established the "right to counsel" in the stationhouse and three years before *Miranda* established the "right" to remain silent in the same place.

When it came to confessions, Justice Jackson was probably the most police-oriented Justice of his day. (It will be recalled that he wrote a strong dissent in the *Ashcraft* case.²⁶⁹) Yet he used "right to counsel" language as far back as 1949. That year Jackson noted that one factor stood out in the three confession cases then before the Court—"[t]he suspect neither had nor was advised of his right to get counsel."²⁷⁰ Surely Justice Jackson did not mean—fifteen years before

Moreover, the summary of voluntariness factors composed by Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961), and quoted by the *Spring* Court, is immediately preceded in *Culombe* by a discussion of whether any factor (such as the failure to caution a prisoner or refusal to permit communication with counsel) constitutes a "single litmus-paper test for constitutionally impermissible interrogation." *Id.* at 601. After answering in the negative, Justice Frankfurter continues "Each of these factors, in company with all of the surrounding circumstances . . . is relevant." *Id.* at 602 (emphasis added). Finally, it should be noted that writing for the majority in *Reck v. Pate*, 367 U.S. 433, 440 (1961), a case handed down only one week before *Culombe*, Justice Stewart observed that "[i]n resolving the ['voluntariness'] issue all the circumstances attendant upon the confession must be taken into account." *Id.* (emphasis added).

²⁶⁶ Burt, *supra* note 71, at 129.

²⁶⁷ 373 U.S. 504 (1973).

²⁶⁸ *Id.* at 510.

²⁶⁹ See *supra* text accompanying notes 164-69.

²⁷⁰ *Watts v. Indiana*, 338 U.S. 49, 57, 59 (1948) (Jackson, J., concurring in the result) (emphasis added). Justice Jackson's concurring opinion in *Watts* also constituted his dissenting opinions in *Turner v. Pennsylvania*, 338 U.S. 62 (1949), and *Harris v. South Carolina*, 338 U.S. 68 (1949).

Escobedo—that a suspect had a right to counsel in the sense that any violation of it rendered a resulting confession inadmissible.²⁷¹

Justice Frankfurter, author of the principal opinions in the three cases Justice Jackson was discussing, noted that in one of the cases, during the entire period of interrogation the defendant was “without advice as to his constitutional rights.”²⁷² In context, this could only have meant the right to counsel and the right to remain silent. In a companion confession case, Justice Frankfurter pointed out that the defendant “was not informed of his right to remain silent” until after he had confessed.²⁷³ Surely Justice Frankfurter was not saying—seventeen years before *Miranda*—that a suspect had a “right” to remain silent in the sense that a failure to know of or to be advised of such a right barred the use of any resulting confession.²⁷⁴

Still another argument in favor of § 3501 needs to be considered, the best one, I think, proponents of the statute have. This is an argument based on how the post-Warren Court has characterized *Miranda*, first in *Michigan v. Tucker*,²⁷⁵ and then in *New York v. Quarles*²⁷⁶ and *Oregon v. Elstad*.²⁷⁷

C. The Implications of the *Tucker-Quarles-Elstad* Way of Thinking about *Miranda*

Tucker was a mild case of police misconduct—a very appealing case from the point of view of the prosecution. First of all, the defendant has been questioned and had confessed before *Miranda* was decided, although his trial took place afterward. Thus, *Miranda* was just barely applicable.²⁷⁸ Second, *Tucker* did not deal with the admissibility of the defendant’s own statements—they had been excluded—but

²⁷¹ A decade after Justice Jackson referred to a suspect’s “right to get counsel,” the Court upheld the admissibility of a confession even though the police had repeatedly denied the suspect’s requests to contact a specific attorney. See *Crooker v. California*, 357 U.S. 445 (1958). For a discussion of *Crooker* and for the view that *Haynes v. Washington*, 373 U.S. 504 (1963), may have, in effect, overruled it, see Yale Kamisar, *Remembering the “Old World” of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 569-75 (1990).

²⁷² *Watts*, 338 U.S. at 53 (emphasis added).

²⁷³ *Turner v. Pennsylvania*, 338 U.S. at 64 (emphasis added).

²⁷⁴ In his long plurality opinion in *Culombe v. Connecticut*, 367 U.S. 568 (1961), an opinion which Chief Justice Warren, concurring, called a “dissertation” on the voluntariness test, *id.* at 635, Justice Frankfurter observed that “even to inform the suspect of his legal right to keep silent will prove an obstruction,” *id.* at 580 (emphasis added); that “[t]here is no indication that at any time Culombe was warned of his right to keep silent,” *id.* at 609-10 (emphasis added); and that Culombe “was apparently never informed of his constitutional rights.” *Id.* at 630 (emphasis added). But *Culombe* was decided five years before *Miranda*.

²⁷⁵ 417 U.S. 433 (1974).

²⁷⁶ 467 U.S. 649 (1984).

²⁷⁷ 470 U.S. 298 (1985).

²⁷⁸ In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court held that *Miranda* affected only those cases in which the trial began after that decision. See *supra* text accompanying

only with the testimony of a witness whose identity had been discovered by questioning the suspect without giving him a complete set of *Miranda* warnings.

Only one member of the Court, Justice Douglas, dissented in *Tucker*.²⁷⁹ Justice White concurred in the result on the ground that *Miranda* did not deal with the testimony of witnesses derived from statements obtained in violation of that case and he would not extend it that far.²⁸⁰ Justice Brennan, joined by Justice Marshall, also concurred in the result, maintaining that the rule applying *Miranda* to trials begun after the date that decision had been announced should not extend to derivative evidence but be confined to "those cases in which the *direct statements* of an accused made during a pre-*Miranda* interrogation were introduced at the post-*Miranda* trial."²⁸¹

Justice Rehnquist's opinion in *Tucker* was the opinion of the Court only because Justice Stewart joined it. But Stewart pointed out that he "could also join" Justice Brennan's concurrence, for it struck him that "despite differences in phraseology, and despite the disclaimers of their respective authors," the two opinions "proceed along virtually parallel lines."²⁸²

Justice Rehnquist's opinion in *Tucker* explaining why, under the circumstances, the witness's testimony was admissible can be read very narrowly.²⁸³ However, the opinion contains a good deal of broad and (from the viewpoint of *Miranda* supporters, at any rate) mischievous language.

The *Tucker* Court seemed to equate the compulsion barred by the privilege against self-incrimination with coercion or involuntariness under the pre-*Miranda* totality of circumstances—voluntariness test.²⁸⁴ This conflation is quite misleading. Much harsher police methods were needed to render a confession coerced or involuntary under the pre-*Miranda* test than are necessary to make a confession compelled within the meaning of the self-incrimination clause.²⁸⁵ That, at least,

note 248. The Court probably should have held that *Miranda* affected only those confessions obtained after the date of the decision.

²⁷⁹ See 417 U.S. at 461 (Douglas, J., dissenting).

²⁸⁰ See *id.* at 460 (White, J., concurring).

²⁸¹ *Id.* at 458 (Brennan, J., concurring).

²⁸² *Id.* at 453 (Stewart, J., concurring).

²⁸³ For example, Justice Rehnquist "consider[ed] it significant to our decision in this case that the officers' failure to advise [defendant] of his right to appointed counsel occurred prior to the decision in *Miranda*." *Id.* at 447. Justice Rehnquist also reasoned that since the statements made to the police by the defendant had been excluded at trial, "[w]hatever deterrent effect on future police conduct the exclusion of those statements may have had" would not be "significantly augmented by excluding the testimony of the witness Henderson as well." *Id.* at 448.

²⁸⁴ See *id.* at 444-46.

²⁸⁵ See Schulhofer, *supra* note 4, at 440-46; Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118-19; see also Yale Kamisar, *The "Police Practice"*

is the premise of *Miranda*. And that, at least, was the understanding of everyone involved in the case.²⁸⁶

The difficulties a defendant faced in establishing that his confession was coerced or involuntary was a principal reason the voluntariness test for the admissibility of confessions was considered inadequate.²⁸⁷ That is why at the time law enforcement officials preferred the old test and resisted the application of the self-incrimination clause to custodial police interrogation. And that is why, although his questioning had been quite mild compared to the oppressive and offensive police methods that had rendered statements inadmissible in the cases applying the old voluntariness test, Ernesto Miranda's confession was held inadmissible.

If *Tucker's* view of *Miranda* was correct—if a violation of *Miranda* were a violation of the self-incrimination clause only if the confession was involuntary under traditional standards²⁸⁸ then it is hard to see what that landmark case would have accomplished by applying the privilege against self-incrimination to the proceedings in the police station. If the privilege were violated only when the confession was deemed coerced or involuntary under the pre-*Miranda* test for the admissibility of confessions, what was all the shouting about in *Miranda*? Why did it matter whether the privilege applied to the police station?

There is an even more troubling aspect to *Tucker*. Justice Rehnquist told us that the *Miranda* Court had recognized that the *Miranda* warnings "were not themselves rights protected by the Constitution, but were instead measures to insure that the right against compulsory

Phases of the Criminal Process and the Three Phases of the Burger Court, in THE BURGER YEARS 143, 152-53 (Herman Schwartz ed., 1987).

²⁸⁶ Thus, dissenting Justice Harlan observed that "[h]aving decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test." *Miranda v. Arizona*, 384 U.S. 436, 511 (1966) (Harlan, J., dissenting). Indeed, one reason proponents of § 3501 were so angry at the *Miranda* Court was that application of the privilege to the police station could bar the use of statements that would have been found voluntary, and thus admissible, under the pre-*Miranda* test. See *supra* note 231.

²⁸⁷ As Stone points out:

[g]iven the Court's inability to articulate a clear and predictable definition of "voluntariness," the apparent persistency of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."

Stone, *supra* note 285, at 102-03 (quoting WALTER SCHAEFER, *THE SUSPECT AND SOCIETY* 10 (1967)); see also Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998) (exploring how the standard of voluntariness in confessions has changed in the last 30 years). See generally Hancock, *supra* note 160; KAMISAR, *supra* note 125, at 67-76; Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867-78 (1981) (essay book review).

²⁸⁸ See *Tucker*, 417 U.S. at 444-45.

self-incrimination was protected."²⁸⁹ Moreover, added Justice Rehnquist, the *Miranda* Court advised us that the suggested safeguards—what the *Tucker* opinion later calls the "prophylactic standards" laid down in *Miranda*²⁹⁰—"were not intended to 'create a constitutional straightjacket.'"²⁹¹

Miranda tells us that the warnings need not be given if, but only if, equally effective alternative safeguards are in place and it tells us this *four different times*.²⁹² Yet *Tucker* never refers to any of the language in the *Miranda* opinion discussing the need for *either* the *Miranda* warnings or other procedural safeguards that are "a fully effective equivalent,"²⁹³ or "at least as effective,"²⁹⁴ or "fully as effective as those described above."²⁹⁵

The language in *Tucker* has turned out to be quite significant. A decade later, first in *New York v. Quarles*²⁹⁶ and then in *Oregon v. Elstad*,²⁹⁷ the Court reiterated *Tucker's* way of looking at, and talking about, *Miranda*. In both *Quarles* and *Elstad*, the Court underscored the distinction between *actual* coercion by physical violence or threats of violence and *inherent* or *irrebutably presumed* coercion (the basis for the *Miranda* rules) and between statements that are *actually* "coerced" or "compelled" and those obtained *merely* in violation of *Miranda's* "procedural safeguards" or "prophylactic rules."²⁹⁸

289 *Id.* at 444.

290 *See id.* at 446-47.

291 *Id.* at 444 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

292 *See Miranda*, 384 U.S. at 467, 476, 479, 490.

293 *Id.* at 476.

294 *Id.* at 467.

295 *Id.* at 490.

296 467 U.S. 649 (1984).

297 470 U.S. 298 (1985).

298 *Quarles* recognized a "public safety" exception to the *Miranda* warnings and thus held both the suspect's statement, "the gun is over there," and the gun found as a result admissible. *Quarles*, 467 U.S. at 657. Relying heavily on *Tucker*, the *Quarles* Court, per Justice Rehnquist, concluded that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* As pointed out in Weisselberg, *supra* note 144, at 129 n.114, the *Quarles* Court's "cost-benefit analysis represents a wholly different view of the value of the Fifth Amendment than was expressed in *Miranda*."

In *Elstad*, relying on the "fruit of the poisonous tree" doctrine, a rule first developed in the search and seizure area, *see* Robert M. Pitler, "The Fruit of the Poisonous Tree" Revisited and Sheppardized, 56 CAL. L. REV. 579 (1968), the defendant contended that his second confession, although immediately preceded by *Miranda* warnings and a valid waiver of rights, should be excluded as the "fruit" of an earlier *Miranda* violation. *Elstad*, 470 U.S. at 303-06. The Court, through Justice O'Connor, disagreed: The fruit of the poisonous tree doctrine "assumes the existence of a constitutional violation," *id.* at 305, but in this case, as in *Tucker*, "the breach of the *Miranda* procedures . . . involved no actual compulsion." *Id.* at 308. Furthermore, violations of "the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Id.* at 309.

Ironically, the language in the *Miranda* opinion that the post-Warren Court used in *Tucker* and subsequent cases to deconstitutionalize *Miranda* is language Chief Justice Warren inserted at the suggestion of Justice Brennan. Commenting on an earlier draft of the *Miranda* opinion, Justice Brennan wrote Warren:

[W]e are justified in policing interrogation practices only to the extent required to prevent denial of the right against compelled self-incrimination as we defined that right in *Malloy [v. Hogan]*. I therefore do not think, as your draft seems to suggest, that there is only a single constitutional solution to the problems of testimonial compulsion inherent in custodial interrogation. I agree that, largely for the reasons you have stated, all four cases must be reversed for lack of any safeguards against denial of the right. I also agree that warnings and the help of counsel are appropriate. But should we not leave Congress and the States latitude to devise other means (if they can) *which might also create an interrogation climate which has the similar effect of preventing the fettering of a person's own will?*²⁹⁹

* * *

Since police interrogation, as presently practiced, carries a substantial risk of testimonial compulsion and indeed is actually now structured to accomplish this overbearing effect, the constitution requires that both federal and state governments must incorporate appropriate safeguarding procedures in their interrogation practices. And while no precise safeguards are required, *none will be deemed sufficient if any less effective than those provided by full warning of rights to silence and counsel*, scrupulously recorded and observed.³⁰⁰

Chief Justice Warren reworked the draft opinion of *Miranda* to accommodate Justice Brennan's suggestions. As we have seen, the new language caught the attention of Attorney General Mitchell's Department of Justice in 1969.³⁰¹

Portions of Justice Rehnquist's opinion in *Tucker* are reminiscent of the 1969 DOJ memorandum.³⁰² As the Justice Department had done five years earlier, Justice Rehnquist made a rather large leap. Starting with the premise that the *Miranda* warnings "were not themselves rights protected by the Constitution"³⁰³ in the sense that alternative procedural safeguards established by a legislature might be

²⁹⁹ Brennan Letter, *supra* note 157, at 3 (emphasis added). For a discussion of, and substantial extracts from, Justice Brennan's lengthy memorandum to the Chief Justice, see Weisselberg, *supra* note 144, at 123-25. In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court, through Justice Brennan, told us that the Fifth Amendment privilege applies to the states to its full extent and the voluntariness of a confession "is controlled by [the self-incrimination] portion of the Fifth Amendment." *Id.* at 7.

³⁰⁰ Brennan Letter, *supra* note 157, at 9 (emphasis added).

³⁰¹ See *supra* text accompanying notes 216-30.

³⁰² However, the DOJ memorandum was not cited in the opinion of the Court or in any of the other four opinions or in any of the briefs.

³⁰³ *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

equally effective—i.e., the *Miranda* safeguards were not intended to “create a constitutional straightjacket”³⁰⁴—Justice Rehnquist concluded that a failure to comply with the procedural rules or prophylactic standards established in *Miranda*—even though *no other* procedural safeguards to protect against inherent compulsion were in place—does not constitute “compulsion sufficient to breach the right against compulsory self-incrimination.”³⁰⁵ This, of course, is similar to the 1969 Justice Department’s argument that since the *Miranda* warnings “are not themselves constitutional absolutes,” Congress has the power to declare by simple legislation that the absence of one or more warnings does not necessarily require that any resulting confession be excluded.³⁰⁶

To be sure, the *Miranda* warnings are not themselves “rights protected by the Constitution” or “constitutional absolutes” in the sense that they are “changeable and contingent”³⁰⁷—they may be replaced by equally effective alternative safeguards—but absent the pre-interrogation warnings or any suitable substitute, statements taken from a custodial suspect are, to cite the language in *Miranda*, “obtained from the defendant under circumstances that [do] not meet constitutional standards for protection of the privilege.”³⁰⁸

As Justice Rehnquist observed in *Tucker*, in order to “supplement this new doctrine”³⁰⁹—the doctrine that “the self-incrimination clause was applicable to state interrogations at a police station, and that a defendant’s statements might be excluded at trial despite their voluntary character under traditional principles”³¹⁰—and in order “to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost, the Court in *Miranda* established a set of specific guidelines, now commonly known as the *Miranda* rules.”³¹¹ But suppose that the *Miranda* Court had *not* “supplemented” its new doctrine—had *not* established a set of specific guidelines to help the police conduct interrogations.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 445.

³⁰⁶ See *supra* text accompanying note 224.

³⁰⁷ Alschuler, *supra* note 138, at 2360 n.19.

³⁰⁸ *Miranda v. Arizona*, 384 U.S. 436, 491 (1966) (emphasis added). At this point, after completing its long discussion of police interrogation and confessions generally, the Court continued:

We turn now to [the facts of each case] to consider the application of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege.

Id. (emphasis added).

³⁰⁹ *Tucker*, 417 U.S. at 443.

³¹⁰ *Id.*

³¹¹ *Id.*

Suppose, instead, that after informing Congress and the states that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice,"³¹² the *Miranda* Court had *stopped right there*. Suppose it had simply left it up to Congress and the states—"in the exercise of their creative rule-making capacities"—to develop their own procedural safeguards for protecting the privilege against self-incrimination during custodial interrogation.³¹³ And suppose, finally, that, instead of responding to the Court's invitation, Congress had simply enacted legislation purporting to "overrule" *Miranda*. Would such legislation, under such circumstances, be valid?

In answering the question I find Professor Stephen Schulhofer's comments quite helpful. After pointing out that "[t]alk about 'overruling' *Miranda* usually obscures the fact that *Miranda* contains not one holding but a complex series of holdings,"³¹⁴ Schulhofer points out that "three conceptually distinct steps were involved in the Court's decision":³¹⁵ (1) informal pressure to speak "can constitute 'compulsion' within the meaning of the Fifth Amendment";³¹⁶ (2) this element of informal compulsion is present in custodial interrogation;³¹⁷ and (3) the now-familiar warnings (or some equally effective alternative) "are required to dispel the compelling pressure of custodial interrogation."³¹⁸ "[T]he core of *Miranda*," maintains Schulhofer, "is located in the first two steps."³¹⁹

If the *Miranda* Court had not prescribed the four warnings, but simply left it up to Congress and the States to devise acceptable procedural safeguards, critics of *Miranda* would not have had the prophylactic *Miranda* warnings to kick around anymore. In that event, I doubt that anybody would seriously argue that Congress could overturn *Miranda* by simple legislation.

But why should what might be called the penultimate holding of *Miranda* be subject to overruling by simple legislation because the ulti-

³¹² *Miranda*, 384 U.S. at 458.

³¹³ Cf. *id.* at 467 ("[i]t is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities"). The *Miranda* court went on to state that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation," and, "Congress and the States are free to develop their own safeguards . . . so long as they are fully as effective as those described above. . . ." *Id.* at 490.

³¹⁴ Schulhofer, *supra* note 4, at 436.

³¹⁵ *Id.*; see also Weisselberg, *supra* note 144, at 112.

³¹⁶ Schulhofer, *supra* note 4, at 436.

³¹⁷ See *id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

mate holding is prophylactic? Section 3501 also purports to "overrule" *Escobedo*. To be sure, *Escobedo* is no longer "good law,"³²⁰ but it was thought to be good law when § 3501 was enacted. If *Escobedo* were still viable, would it have been protected from legislative overruling because it declined to establish any concrete guidelines—leaving many police, prosecutors, and lower court judges bewildered?³²¹ Is *Miranda*, on the other hand, vulnerable to legislative overruling because it took pains to tell law enforcement officials how they could continue questioning custodial suspects instead of leaving them "to guess about what countermeasures would keep police on the safe side of the constitutional line"?³²²

Allow me to make my point another way, by changing the facts in *Furman v. Georgia*.³²³ As we all know, none of the five Justices who wrote separate opinions invalidating the death penalty as it was then administered told Congress and the states precisely how they could satisfy the Court's concerns that the death penalty not be imposed in an arbitrary or capricious manner. But suppose they had. Suppose the 5-4 majority in *Furman* had told us that it could not say that the Constitution requires adherence to any particular solution, but unless shown other procedures which are at least as effective, adoption of the Model Penal Code's alternative provision on capital punishment would pass muster under the Eighth and Fourteenth Amendments.³²⁴

The Model Code provision would then be a prophylactic rule. But surely the fact that this aspect of *Furman* was prophylactic—that it was not constitutional in character in the sense that alternative procedural safeguards might be available—would not permit Congress to reject the Model Code provision, establish no alternative procedures either, yet overturn *Furman* lock, stock, and barrel. But is this not essentially what Congress did to *Miranda* when it enacted § 3501?

Professor Henry Monaghan's article on the Court's power to fashion "constitutional common law"³²⁵ has created considerable interest and evoked strong criticism.³²⁶ But assuming *arguendo* that he is

³²⁰ See *supra* note 3.

³²¹ See *id.*

³²² Schulhofer, *supra* note 4, at 454. As Professor Schulhofer points out, in *Tucker* Justice Rehnquist recognized that *Miranda* "established a set of specific protective guidelines, now commonly known as the *Miranda* rules," in order "to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost." *Michigan v. Tucker*, 417 U.S. 433, 443 (1974); see Schulhofer, *supra* note 4, at 454.

³²³ 408 U.S. 238 (1972) (per curiam); Schulhofer, *supra* note 4, at 454; see also *supra* notes 187-97.

³²⁴ See MODEL PENAL CODE § 210.6 (1962).

³²⁵ Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

³²⁶ See Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978); see also Thomas S. Schrock, Robert C. Welsh, & Ronald Collins, *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 SO. CAL. L. REV. 1 (1978).

right and that the *Miranda* rules constitute "constitutional common law"—"rules drawing their inspiration and authority from, but not required by, various constitutional provisions"³²⁷—this is surely not true of *Miranda*'s first two holdings. These holdings, to use Professor Monaghan's terminology, constitute "*Marbury*-shielded constitutional exegesis."³²⁸

Monaghan tells us that, unlike constitutional common law, "a holding that the constitutionally-based freedom from unreasonable searches and seizures embraces electronic eavesdropping, whether correct or not on the merits, constitutes an interpretative filling-out of the underlying constitutional guarantee."³²⁹ But this is no less true of a holding—and this happens to be one of *Miranda*'s holdings—that the constitutionally-based privilege against self-incrimination embraces police interrogation in the stationhouse. Whether correct or not on the merits, this, too, is plainly "an interpretative filling-out of the underlying constitutional guarantee."³³⁰

That the *Miranda* warnings are an exercise of "the Supreme Court's power to fashion constitutional common law,"³³¹ that they are "constitutionally inspired implementing rules"³³² rather than what might be called true, or *Marbury*-shielded, constitutional law, does not, Professor Monaghan would agree, make them any less legitimate or useful.

The privilege against self-incrimination, along with other constitutional guarantees, needs "breathing space."³³³ What the *Miranda* Court did, I think it fair to say, was to try to assure that no confession *actually* compelled would be admitted into evidence. It did so by establishing conclusive presumptions and related forms of prophylactic rules to implement or to reinforce the privilege against self-incrimination—in order to guard against *actual* constitutional violations. Is this improper?

Yes, answers Professor Joseph Grano, for many years (until the compelling presence on the scene of Professor Paul Cassell)³³⁴ the

³²⁷ Monaghan, *supra* note 325, at 3.

³²⁸ *Id.* at 31.

³²⁹ *Id.* at 23.

³³⁰ *Id.*

³³¹ *Id.* at 19.

³³² *Id.*

³³³ *Cf.* Weatherford v. Bursey, 429 U.S. 545, 565 (1977) (Marshall, J., dissenting).

³³⁴ See Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327 (1997); Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175 (1999); Cassell, *supra* note 142, at 387; Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-year Perspective and Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

nation's leading critic of *Miranda*. As the Court now characterizes what it did in *Miranda*, contends Professor Grano, that case is an illegitimate decision.³³⁵ To permit federal courts to impose on the states prophylactic rules, i.e., rules that may be violated without violating the Constitution itself, maintains Grano, is "to say in essence that federal courts have supervisory power over state courts."³³⁶ According to Grano, the Court lacks constitutional authority to overturn state convictions "absent an actual violation of either the Constitution or some other valid federal law."³³⁷

For the reasons advanced by Stephen Schulhofer and David Strauss, I strongly disagree. "A conclusive presumption of compulsion," writes Professor Schulhofer, "is in fact a responsible reaction to the problems of the voluntariness test, to the rarity of cases in which compelling pressures are truly absent, and to the adjudicatory costs of case-by-case decisions in this area."³³⁸ More generally, as Professor Strauss maintains, "it makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that these realities be ignored."³³⁹

Suppose *Miranda* had established a *rebuttable* presumption that any incriminating statement obtained in a custodial setting in the absence of *Miranda* safeguards (or equally effective procedures) is compelled, but that this presumption could be overcome if the suspect were a police officer, lawyer, or law student. Such a presumption would produce the same result a *conclusive* presumption would in at least ninety-five percent of the cases. But so far as I know everybody agrees that a court's responsibility to achieve accurate fact finding permits it to assign burdens of proof and to adopt rebuttable presumptions. As Professor Strauss argues, if it is legitimate for a court to decide that evidence of voluntariness is legally immaterial in some cases (where the evidence is insufficient to overcome a rebuttable presumption), why should it be—how can it be—improper for a court to extend that approach to all cases?³⁴⁰

335 See GRANO, *supra* note 170, at 174, 185-98. In his book Professor Grano draws upon and elaborates on arguments he made in a number of earlier articles. See, e.g., Joseph D. Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243 (1986); Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985).

336 GRANO, *supra* note 170, at 191.

337 *Id.* at 183.

338 Schulhofer, *supra* note 4, at 453.

339 David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 208 (1988).

340 See *id.* at 194.

Miranda is based on the realization that case-by-case determination and review of the voluntariness of a confession, in light of the totality of the circumstances, was severely testing the capacity of the judiciary and that institutional realities warranted a conclusive presumption that a confession obtained under certain conditions and in the absence of certain safeguards was compelled. As Schulhofer and Strauss maintain, under any plausible approach to constitutional interpretation, courts must be allowed to take into account their fact-finding limitations.

Miranda was not the first confession case in which the Court prescribed prophylactic procedures to protect or implement an underlying constitutional right. Recall *Jackson v. Denno*.³⁴¹

Under the New York procedures invalidated in *Jackson*, the determination of a confession's voluntary character, as well as its truthfulness, was usually left to the jury. Because the New York procedure "did not afford a reliable determination of the voluntariness of the confession offered in evidence"³⁴² and thus "did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession,"³⁴³ the Court ruled that the procedure violated Fourteenth Amendment due process. As Justice White observed for the majority:

The danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review in this Court, regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt.³⁴⁴

* * *

The admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential facts are disputed, for we cannot determine how the jury resolved these issues and will not assume that they were reliably and properly resolved against the accused. And it is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant. . . .³⁴⁵

It strikes me that what the Court did in *Jackson v. Denno* is essentially no different than what it did in *Miranda*.

The *Jackson* ruling, no less than *Miranda*, protects or provides safeguards for the constitutional guarantee (in *Jackson*, the Fourteenth

³⁴¹ 378 U.S. 368 (1964). For a brief discussion of, and extracts from, *Jackson*, see *supra* text accompanying notes 202-07.

³⁴² *Jackson*, 378 U.S. at 377.

³⁴³ *Id.*

³⁴⁴ *Id.* at 383.

³⁴⁵ *Id.* at 387.

Amendment Due Process prohibition against the use of coerced confessions) and "sweeps more broadly" than the constitutional guarantee itself.³⁴⁶ The *Jackson* Court did not say that under the New York procedures a defendant *never* received a fair and clear-cut determination that the confession used against him was in fact voluntary. Nor did it even say that under such a procedure a defendant failed to receive such a determination *more often than not*.

The Court only told us that the New York procedure "poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined."³⁴⁷ The Court only told us that unless the "voluntariness" of a defendant's confession were "determined in a proceeding separate and apart from the body trying guilt or innocence,"³⁴⁸ it could not be confident that a defendant had received "a reliable and clear-cut determination" of the issue.³⁴⁹

I do not think there is much distance between *Jackson* and *Miranda*. If the Court may prescribe procedures to ensure that the conclusion a confession is voluntary is not reached for improper reasons, why can it not prescribe procedures to ensure that a custodial suspect does not confess for improper reasons? Because he believes that police have a right to an answer? Or that his silence will be used against him? Or because he thinks he has no right to counsel in the police station?

Surely, police interrogation, as generally practiced at the time *Miranda* was decided, "[p]osed substantial threats" to a defendant's Fifth Amendment rights³⁵⁰—a significant danger that a custodial suspect might make incriminating statements to the police because he misunderstood his rights, or because he did not realize he had any rights, or was led to believe he did not have any. Would not one obvious way to take proper account of these dangers—to ensure a reliable determination that a custodial suspect was not compelled to speak within the meaning of the self-incrimination clause—be to require the police to inform a custodial suspect of his rights?

If the *Jackson* Court could take steps to ensure that the voluntariness question was "fairly and reliably determined," why could the *Miranda* Court not take steps to ensure that the question why the suspect spoke to the police—what induced him to do so—be resolved fairly and reliably? Did the suspect incriminate himself because he wanted

³⁴⁶ Cf. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.").

³⁴⁷ *Jackson*, 378 U.S. at 389.

³⁴⁸ *Id.* at 394.

³⁴⁹ *Id.* at 391.

³⁵⁰ *Id.* at 389.

to "get it off his chest"? Or because he thought he could match wits with the police? Or did he talk to the police because he thought he had to do so or that it would be so much the worse for him if he did not? How else could one resolve this question fairly and reliably unless one required the police to advise a custodial suspect of his rights?

Jackson v. Denno is not the only confession case other than *Miranda* to prescribe prophylactic rules. *Maine v. Moulton* did so as well.³⁵¹ The *Massiah* doctrine holds that once formal charges have been filed against an individual the right to counsel has "attached," i.e., the individual has a right to counsel when the government deliberately elicits incriminating statements from him.³⁵² But law enforcement officers have the right, if not the duty, to continue to investigate the individual for reasons unrelated to the gathering of evidence concerning charges to which the right to counsel has attached.³⁵³ For example, if there are reports that an indicted person plans to harm a witness or bribe a juror, the government can continue to investigate those matters.

The trouble is that law enforcement officials investigating an individual suspected of committing, or about to commit, a new crime and formally charged with having committed another one "obviously seek to discover evidence useful at a trial of either crime."³⁵⁴ The Court's "sensible solution" to the problem³⁵⁵ was to establish a rule barring incriminating statements pertaining to pending charges "notwithstanding the fact that the police were also investigating other crimes, if, in obtaining the evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel."³⁵⁶ Explained Justice Brennan, for a 5-4 majority:

To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance [in this case, to insure the safety of their undercover agent and to procure information concerning a report that defendant was planning to kill a witness] invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at

³⁵¹ 474 U.S. 159 (1985).

³⁵² *Massiah v. United States*, 377 U.S. 201 (1964).

³⁵³ See *Moulton*, 474 U.S. at 178-179.

³⁵⁴ *Id.* at 179.

³⁵⁵ See *id.*

³⁵⁶ *Id.* at 180.

that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.³⁵⁷

Thus, despite the fact the trial judge found that the police had obtained statements from Mr. Moulton "for legitimate purposes not related to the gathering of evidence concerning the crime for which [he] had been indicted,"³⁵⁸ the Court excluded incriminating statements pertaining to pending charges against Moulton.

The *Moulton* case, point out Professors Wayne LaFave, Jerold Israel, and Nancy King in the new edition of their treatise, "illustrates the potential for use of a prophylactic remedial measure to respond to situations in which a violation has not necessarily occurred, but the adjudicatory process would face significant obstacles in determining whether it had occurred."³⁵⁹ Thus, *Moulton*, like *Miranda*, "sweeps more broadly than the constitutional guarantee itself."³⁶⁰

A final word about establishing conclusive presumptions and promulgating other kinds of prophylactic rules. If, as Professor Grano has maintained, the Warren Court exceeded its constitutional authority in *Miranda*, then the Burger Court (in *Edwards v. Arizona*³⁶¹) and the Rehnquist Court (in *Arizona v. Roberson*³⁶² and *Minnick v. Mississippi*³⁶³) aggravated this transgression.

Edwards held, in effect, that when a custodial suspect invokes his right to counsel, thereby expressing his belief that he is incapable of

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 192 (Burger, C.J., dissenting).

³⁵⁹ LAFAVE, ISRAEL & KING, *supra* note 157, § 2.9(e), at 675. Consider, too, *North Carolina v. Pearce*, 395 U.S. 711 (1969), a case that LaFave, Israel and King tell us has come to be viewed, along with *Miranda*, as "paradigmatic of prophylactic decision making." *Id.* at 676.

After a number of defendants had managed to overturn their convictions only to be given a heavier sentence for the same crime when they were retried and reconvicted, there was reason to think that in some of these cases, at least, sentencing judges were punishing defendants for having succeeded in getting their first convictions set aside. Because the existence of a retaliatory motivation would be "extremely difficult to prove in any individual case," *id.* at 725 n.20, the *Pearce* Court established a presumption of vindictiveness. Absent a showing that the heavier sentence upon retrial was based on specific conduct on the part of defendant occurring after the time of the first sentence, vindictiveness against the defendant for having successfully attacked his first conviction was presumed and the sentence he received on retrial deemed violative of due process. *See id.*

Four years after *Pearce* was decided, in *Michigan v. Payne*, 412 U.S. 47, 53 (1973), the Court explained and defended "the *Pearce* prophylactic rules" by analogizing them to the *Miranda* rules. "[T]he prophylactic rules in *Pearce* and *Miranda* are similar," the Court told us, "in that each was designed to preserve the integrity of a phase of the criminal process." *Id.* at 53.

I have discussed the *Pearce* case and its progeny at some length elsewhere. *See* Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 472-73 (1999); *see also* LAFAVE, ISRAEL & KING, *supra* note 157, at 676-78.

³⁶⁰ *See supra* note 346 and accompanying text.

³⁶¹ 451 U.S. 477 (1981).

³⁶² 486 U.S. 675 (1988).

³⁶³ 498 U.S. 146 (1990).

undergoing police questioning without legal assistance, there is a *conclusive presumption* that any subsequent waiver of rights that comes at police instigation, not at the suspect's own behest, is compelled.³⁶⁴ In *Roberson*, which reaffirmed and extended the *Edwards* rule, the Court spoke *approvingly* of "the bright-line prophylactic *Edwards* rule,"³⁶⁵ pointing out that "[w]e have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*."³⁶⁶

By holding that once a suspect invokes his right to a lawyer the police may not reinitiate interrogation in the absence of counsel—even if the suspect has been allowed to consult with an attorney in the interim—*Minnick* made the *Edwards* rule more formidable still. In the course of his majority opinion in *Minnick*, Justice Kennedy made a comment about the *Edwards* rule that applies to *Miranda* as well: "[The rule] ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness"³⁶⁷

Dissenting in *Minnick*, Justice Scalia (joined by the Chief Justice) protested that the Court's ruling "is the latest stage of prophylaxis built on prophylaxis."³⁶⁸ As Justice Scalia described the *Miranda-Edwards* line of cases: *Minnick* was a prophylactic rule needed to protect *Edwards* which was a prophylactic rule needed to protect *Miranda* which was a prophylactic rule "needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution."³⁶⁹

Even though Justice Scalia left no doubt that he was unhappy about the Court building prophylaxis upon prophylaxis, I think his description of what the Court did in *Edwards*, *Roberson*, and *Minnick* is accurate. If the Warren Court acted illegitimately in *Miranda* by establishing prophylactic rules, the Courts which succeeded it have been repeat offenders.

III

SOME FINAL THOUGHTS

The Court's characterization of *Miranda* in *Tucker*, *Quarles*, and *Elstad* gives proponents of § 3501 an argument they did not make—and they did not have—when the statute was debated and enacted more than three decades ago. Nevertheless, I think proponents of

³⁶⁴ See *Edwards*, 451 U.S. at 484-85.

³⁶⁵ *Roberson*, 486 U.S. at 682.

³⁶⁶ *Id.* at 681.

³⁶⁷ *Minnick*, 498 U.S. at 151.

³⁶⁸ *Id.* at 166 (Scalia, J. dissenting)

³⁶⁹ *Id.*

§ 3501 overstate the significance of the prophylactic nature of the *Miranda* warnings.

The specified procedures established in *Miranda* may be prophylactic, but not the penultimate *Miranda* holding. I share Professor Schulhofer's view that "[t]he crux of *Miranda* was not so much the now-famous warnings but rather the Court's holding that 'all the principles embodied in the [Fifth Amendment] privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. . . .'"³⁷⁰ But § 3501 purports to overrule all of *Miranda*, not just the prophylactic *Miranda* warnings.

I do not deny that the *Miranda* Court's recognition that Congress could devise a suitable substitute for the now-familiar warnings "leaves the door open for Congress to replace those rules with other safeguards that serve the same preventative function."³⁷¹ I only contend that Congress did not walk in the door. It chose not to replace the *Miranda* warnings with a credible substitute. Instead, as I have maintained at considerable length, Congress contented itself with making the pre-*Miranda* voluntariness test the sole test for the admissibility of confessions. As Professor George Thomas has recently observed, "[i]t would be paradoxical to permit a statutory version of voluntariness to replace the *Miranda* presumption that the Court used to replace the voluntariness test."³⁷²

Although *Miranda* has not fared well in the post-Warren Court era,³⁷³ not all the opinions written in confession cases over the past thirty years have saddened the hearts of *Miranda*'s friends.

³⁷⁰ Schulhofer, *supra* note 287, at 878 (quoting *Miranda v. Arizona*, 384 U.S. 436, 461 (1966)).

³⁷¹ LAFAVE, ISRAEL & KING, *supra* note 157, § 2.9(e), at 674.

³⁷² Statement of George Thomas III before the Subcommittee on Criminal Justice Oversight of the U.S. Senate Committee on the Judiciary Concerning the Enforcement of 18 U.S.C. § 3501 (May 13, 1999), reprinted in YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 1999 SUPPLEMENT TO MODERN CRIMINAL PROCEDURE 25-26 (9th ed. 1999) [hereinafter Thomas, Statement].

³⁷³ In addition to *Tucker*, *Quarles* and *Elstad*, two impeachment cases, *Harris v. New York*, 401 U.S. 222 (1971), and *Oregon v. Hass*, 420 U.S. 714 (1975), are worthy of mention. *Harris*, the first blow the Burger Court struck *Miranda*, held that statements preceded by defective warnings, and thus inadmissible to establish the government's case-in-chief, could nevertheless be used to impeach the defendant's credibility if she chose to take the stand in her defense. See *Harris*, 401 U.S. at 225-26. The Court noted, but seemed unperturbed by the fact, that the same language in the *Miranda* opinion could be read as barring the use of statements obtained in violation of *Miranda* for any purpose. See *id.* at 224.

The Court went a step beyond *Harris* in the second impeachment case, *Hass*. In this case, after being advised of his rights, the suspect asserted his right to counsel. See *Haas*, 420 U.S. at 715. Nevertheless, the police refused to honor the request for a lawyer and continued to question the suspect. See *id.* at 716. The Court ruled that here, too, the resulting incriminating statements could be used for impeachment purposes. See *id.* at 722. Because many suspects make incriminating statements even after the receipt of complete *Miranda* warnings, *Harris* might have been explained—and contained—on the ground that permitting impeachment use of statements required without complete warnings would not greatly

The *Edwards-Roberson-Minnick* line of cases provides reason to believe that a majority of the Court is attracted to a rule that "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness."³⁷⁴ Justice Scalia wrote a powerful dissent in *Minnick*, but it strikes me that the fact that only the Chief Justice joined him underscores the significance of Justice Kennedy's majority opinion.

Although the defendant lost in *Moran v. Burbine*,³⁷⁵ and not a few civil libertarians were unhappy with the result,³⁷⁶ more important than *Burbine's* specific holding, I think, is the way the *Burbine* Court looked back at *Miranda*. Justice O'Connor spoke for six Justices when she told us that *Miranda* "as written" struck the "proper balance" between law enforcement interests and a custodial suspect's Fifth Amendment rights.³⁷⁷ She also viewed *Miranda* as a case that "embodies a carefully crafted balance designed to fully protect both the defendant's and society's interests."³⁷⁸ This is the way *Miranda's* defenders—not its critics—have talked about the case for the past three decades.

*Withrow v. Williams*³⁷⁹ had more nice things to say about *Miranda* than any other case in the last three decades. What *Withrow* did is no less significant than what it said about *Miranda*. As Professor Thomas has observed, "*Withrow* is particularly noteworthy because it held that a *Miranda* claim can be used in federal habeas to overturn a state conviction that had already survived direct appeal in state and federal court."³⁸⁰

encourage the police to violate *Miranda*. But in light of the *Hass* ruling, when suspects assert their rights, the police seem to have very little to lose and much to gain by continuing to question them in violation of *Miranda*.

The Court subsequently held that a defendant's prearrest silence could be used to impeach him when he testified in his own defense, see *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980), and then, so long as the police did not issue the *Miranda* warnings, that even a defendant's postarrest silence could be used for impeachment purposes, see *Fletcher v. Weir*, 455 U.S. 603 (1982). Both *Jenkins* and *Weir* distinguished *Doyle v. Ohio*, 426 U.S. 610 (1976), which deemed it a violation of due process to use a defendant's silence for impeachment purposes when the defendant remained silent after being given the *Miranda* warnings. See *Jenkins*, 447 U.S. at 239-40; *Weir*, 455 U.S. at 605-06.

³⁷⁴ *Minnick*, 498 U.S. at 151.

³⁷⁵ 475 U.S. 412 (1986).

³⁷⁶ *Burbine* held that a confession preceded by an otherwise valid waiver of *Miranda* rights by a suspect who had never asked anyone to get him a lawyer and did not know that his sister had done so on her own initiative should not be excluded either (a) because the police misled an inquiring attorney when they told her they were not going to question the suspect she called about, or (b) because the police failed to inform the suspect of the attorney's efforts to reach him. See *id.* at 422-23.

³⁷⁷ *Id.* at 424.

³⁷⁸ *Id.* at 433 n.4.

³⁷⁹ 507 U.S. 680 (1993).

³⁸⁰ Thomas, Statement, *supra* note 372, at 25.

The government argued in *Withrow* that since the *Miranda* rules "are not constitutional in character, but merely 'prophylactic,'" federal habeas review should not extend to claims based on violations of these rules.³⁸¹ A majority of the Court accepted the government's characterization of the *Miranda* safeguards, for purposes of the case, but not the government's conclusion.

Justice Souter, who wrote the opinion of the Court in *Withrow*, did not deny that "we have sometimes called the *Miranda* safeguards 'prophylactic' in nature"³⁸² (because, explained Souter, violation of these safeguards might lead to the exclusion of statements that would not be found involuntary under pre-*Miranda* standards). But this, he noted, is a "far cry" from putting *Miranda* in the same category as the search and seizure exclusionary rule or from rendering *Miranda* subject to the same restrictions on the exercise of federal habeas jurisdiction that apply to search and seizure cases.³⁸³

The Fourth Amendment exclusionary rule, observed the Court, cannot "be thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial,"³⁸⁴ but *Miranda* differs in this respect: "'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'"³⁸⁵ It "brace[s] against 'the possibility of unreliable statements in every instance of in-custody interrogation,'" and thereby "serves to guard against 'the use of unreliable statements at trial.'"³⁸⁶

If the *Miranda* warnings lacked a constitutional foundation, how could the warnings be applied to the states on federal habeas review? For that matter, how could *Miranda* continue to be applied to the states on direct review? The Court has reminded us that its authority with respect to state courts "is limited to enforcing the commands of the U.S. Constitution."³⁸⁷ Yet long after it handed down its opinion in the *Tucker* case the Court has continued to overturn state convictions because of *Miranda* violations.³⁸⁸ What the Court did in *Miranda*³⁸⁹ and what it has continued to do ever since seem to speak louder than what the Court said about *Miranda* in *Tucker* and its progeny.

³⁸¹ *Withrow*, 507 U.S. at 690.

³⁸² *Id.*

³⁸³ *Id.* at 691.

³⁸⁴ *Id.*

³⁸⁵ *Id.* (quoting *United States v. Verdugo-Viriquidez*, 494 U.S. 259, 264 (1990)).

³⁸⁶ *Withrow*, 507 U.S. at 692 (quoting *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966)).

³⁸⁷ *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991).

³⁸⁸ See, e.g., *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Edwards v. Arizona*, 451 U.S. 477 (1981).

³⁸⁹ Three of the four cases the Court decided in *Miranda* were state cases.

Dissenting from the Fourth Circuit's ruling in *Dickerson* in favor of § 3501, Judge Blaine Michael asked: "If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it to prosecutions arising in state courts?"³⁹⁰ The *Dickerson* majority brushed this query aside in a footnote, calling it "an interesting academic question."³⁹¹ I would call it a basic question, a practical question, and one that deserves an answer.

The *Dickerson* court spoke of "Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts."³⁹² But Congress can no more establish rules of evidence violating the Fifth Amendment than it can prescribe sentences for federal crimes that violate the Eighth Amendment.

In a sense, the *Miranda* rules are rules of evidence. But in a sense so are many of the rules governing the admissibility of confessions—the *Massiah* doctrine,³⁹³ *Wong Sun*,³⁹⁴ and the "voluntariness" test itself. But all the rules mentioned, as well as *Miranda*, are also rules of constitutional dimension.

Could Congress abolish the *Massiah* doctrine in the federal courts?³⁹⁵ When it became clear, as it did a number of years before *Escobedo* and *Miranda*, that untrustworthiness was no longer the principal reason for excluding coerced or involuntary confessions,³⁹⁶ could Congress modify the voluntariness test in the federal courts by mandating the admissibility of coerced confessions when corroborated by physical evidence?³⁹⁷

³⁹⁰ *United States v. Dickerson*, 166 F.3d 667, 697 (4th Cir.), *cert. denied*, 120 S. Ct. 275 (1999).

³⁹¹ *Id.* at 691 n.21.

³⁹² *Id.* at 692.

³⁹³ See *supra* discussion at note 5.

³⁹⁴ See *id.*

³⁹⁵ As noted earlier, see *supra* note 5, by declaring that voluntariness is the sole test for the admissibility of confessions in the federal courts, § 3501 does literally overrule *Massiah*. But so far as I know, nobody has taken this reading of § 3501 seriously.

³⁹⁶ The most emphatic articulation of this view may be found in *Rogers v. Richmond*, 365 U.S. 534, 540-44 (1961), but *Rogers* only "made certain what had been strongly intimated in several earlier cases, such as *Ashcraft v. Tennessee* [322 U.S. 143 (1944)] and *Haley v. Ohio* [332 U.S. 596 (1948)], namely, that the due process exclusionary rule for confessions (in much the same way as the Fourth Amendment exclusionary rule for physical evidence) is also intended to deter improper police conduct." *LAFAVE, ISRAEL & KING, supra* note 157, § 6.2(b), at 445. See generally *Hancock, supra* note 160; *KAMISAR, supra* note 163.

³⁹⁷ As the Court, through Justice Frankfurter, observed in *Rogers*:

[I]n many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement.

Rogers, 365 U.S. at 541.

It is worth recalling what Justice Frankfurter once said about the rules of evidence governing the admissibility of confessions:

[B]ecause it is the courts which are charged, in the ultimate, both with the enforcement of the criminal law and with safeguarding the criminal defendant's rights to procedures consistent with fundamental fairness, the problem of reconciling society's need for police interrogation with society's need for protection from the possible abuses of police interrogation decisively devolves upon the courts, particularly in connection with the rules of evidence which regulate the admissibility of extrajudicial confessions.³⁹⁸

More is at stake in the *Dickerson* case than *Miranda*. What is also at issue is the ability of the Court to interpret constitutional provisions in light of institutional realities, to take into account its own fact-finding limitations, and to utilize presumptions and prophylactic rules in order to make constitutional rights more meaningful.

Although *Boerne v. Flores*³⁹⁹ involved the scope of Congress's enforcement power under section five of the Fourteenth Amendment and *Dickerson* does not, what Justice Kennedy said for the Court in *Boerne* about Congress "defin[ing] its own powers by altering the Fourteenth Amendment's meaning" applies as well when Congress alters the Fifth Amendment's meaning: If Congress could do so, "no longer would the Constitution be 'superior paramount law unchangeable by ordinary means.'"⁴⁰⁰

How will it all end? Will *Miranda* survive or will § 3501 prevail? When the Court provides the answer, hopefully it will quote the following passage from *Boerne* with approval:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.⁴⁰¹

³⁹⁸ *Culombe v. Connecticut*, 367 U.S. 568, 586-87 (1961) (plurality opinion).

³⁹⁹ 521 U.S. 507 (1997).

⁴⁰⁰ *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁴⁰¹ *Id.* at 536.